Rel: June 14, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1171045

Daniel Kyle Donaldson

v.

Country Mutual Insurance Company

Appeal from Madison Circuit Court
(CV-15-902120)

SELLERS, Justice.

Daniel Kyle Donaldson appeals from a summary judgment in favor of Country Mutual Insurance Company ("Country Mutual"). We affirm.

Facts and Procedural History

The underlying action stems from a November 2015 accident in which Donaldson, while working in a construction zone on the west side of Bailey Cove Road in Madison County, was struck by a GMC Yukon sport-utility vehicle, owned and driven by Gregory Ryan Johnston. As a result of the collision, Donaldson suffered severe injuries to one of his legs that ultimately required the amputation of the leg.

Donaldson sued Johnston and Country Mutual, asserting claims of negligence and wantonness against Johnston and asserting that Country Mutual was vicariously liable for Johnston's conduct under theories of agency and respondeat superior. At the time of the underlying accident, Johnston was working as an insurance agent under an "agent's agreement" with Country Mutual and a number of other companies that are collectively referred to in that agreement as "Country Insurance and Financial Services."[1] Pursuant to that

[1]In addition to Country Mutual, the following companies were also parties to the agent's agreement executed by Johnston: Country Life Insurance Company, Country Investors Life Assurance Company, Country Casualty Insurance Company, Country Preferred Insurance Company, Mutual Service Life Insurance Company, Mutual Service Casualty Insurance Company, Modern Service Insurance Company, MSI Preferred Insurance Company, Cotton States Life Insurance Company, Cotton States Mutual Insurance Company, Shield Insurance Company, and CC Services, Inc. Although the relationship between these

agreement, Johnston solicited applications for the insurance products of Country Mutual and the other named companies, bound coverage and delivered insurance policies as approved by those companies, transmitted premiums received from policyholders to those companies, and provided customer service to policyholders. The agent's agreement expressly identified Johnston as an independent contractor and stated that "nothing in this Agreement shall be construed to create the relationship of employer and employee" between the parties.

Country Mutual filed a motion for a summary judgment, arguing that Johnston was not its agent or employee but, instead, was an independent contractor. Country Mutual further argued that, even assuming Johnston was its employee, his actions in relation to the accident were outside the line and scope of his alleged employment. In opposition, Donaldson argued that a genuine issue of material fact existed as to whether Johnston was an employee of Country Mutual and whether he was acting within the line and scope of that employment at the time the accident occurred. The Madison Circuit Court

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companies is not entirely clear, the record suggests that they are all affiliated with one another.

("the trial court") granted Country Mutual's motion for a summary judgment. The case proceeded to trial on the remaining claims against Johnston; the jury found in favor of Donaldson on both the negligence and wantonness claims and awarded him $5,560,000 in compensatory damages. After the trial court entered a judgment on the jury's verdict, Donaldson filed this appeal challenging the summary judgment in favor of Country Mutual.

Standard of Review

> "This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v.

> Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004).

Discussion

Donaldson's claims against Country Mutual are based on the theory of respondeat superior. "To recover against a defendant on the theory of respondeat superior, it is necessary for the plaintiff to establish the status of master and servant and to establish that the act was done within the scope of the servant's employment." Jenkins v. Gadsden Times Publ'g Corp., 521 So. 2d 957, 958 (Ala. 1988)(citing Solmica of the Gulf Coast, Inc. v. Braggs, 285 Ala. 396, 232 So. 2d 638 (1970)).

To determine if a person is the servant or employee of another, rather than an independent contractor, we look at "whether the entity for whom the work is being performed has reserved the right of control over the means by which the work is done." Shaw v. C.B. & E., Inc., 630 So. 2d 401, 403 (Ala. 1993)(citing Bay Shore Props., Inc. v. Drew Corp., 565 So. 2d 32 (Ala. 1990)(emphasis added)). Thus, for an employer-employee relationship to exist, the purported employer must

retain the right to direct the manner in which the individual's work is to be performed, as well as the result the employer desires the individual to accomplish. See Birmingham Post Co. v. Sturgeon, 227 Ala. 162, 166, 149 So. 74, 77 (Ala. 1933). It is the reserved right of control, and not the actual exercise of such control, that governs the relationship. Shaw, 630 So. 2d at 403.

How the parties characterize their relationship is not necessarily determinative of whether an individual is an independent contractor or an employee. Owen v. Tennessee Valley Printing Co., 168 So. 3d 1221, 1233 (Ala. Civ. App. 2014). "Because working relationships take a wide variety of forms, each case must depend on its own facts, and all features of the relationship are considered together." Sessions Co. v. Turner, 493 So. 2d 1387, 1390 (Ala. 1986)(citing Burbic Contracting Co. v. Willis, 386 So. 2d 419 (Ala. 1980)).

The undisputed evidence submitted to the trial court indicates the following about Johnston's relationship with Country Mutual: Johnston was considered a "career agent" or "career representative" for the companies listed in the

agent's agreement, which included Country Mutual. Country Mutual provided Johnston an initial grant when he began working as a career agent in 2009; thereafter, Country Mutual paid Johnston only by commission in accordance with a commission schedule Country Mutual provided. Under the agent's agreement, Johnston was required to represent Country Mutual and the additional named companies exclusively; however, he did, at times, sell insurance products for other third-party companies with Country Mutual's consent. Johnston conducted his business as The Johnston Agency LLC. Johnston rented and maintained his own office space, hired his own staff, and paid self-employment taxes. Country Mutual provided Johnston a laptop and desktop computer for his office that he was required to use in order to access the company's secure intranet and confidential policyholder information. Country Mutual also provided Johnston a telephone system for his office at his discretion that he paid for through a deduction from his commission. Johnston advertised for his agency as he deemed appropriate; however, any advertisements containing Country Mutual's name or service marks had to be submitted to Country Mutual for approval prior to use. In such instances,

the cost of those advertisements were split between Johnston and Country Mutual. Under the agent's agreement, each party retained the right to terminate the contract upon written notice to the other party. Country Mutual terminated Johnston's contract in 2016.

Significantly, for the sake of our analysis, the evidence submitted to the trial court failed to show that Country Mutual retained the right to control Johnston's time or his day-to-day activities. Johnston determined his own work schedule and the hours of operation of his office. Johnston was not assigned a specific territory; he solicited potential customers at his own discretion and in whatever manner he deemed the most effective. Johnston was supervised in some capacity by an agency manager who oversaw all the agents in North Alabama working with Country Mutual. However, Johnston's agency manager at the time of the accident stated that he was not Johnston's "direct supervisor" because he did not "have authority over him in a typical supervisory capacity." Johnston's previous agency manager stated that his supervisory duties were to make sure that representatives were "doing things the way that would be in compliance with the law."

Johnston stated that the agency manager "was there if we needed him for questions" and would "help guide" him through customer complaints but indicated that the agency manager did not tell him how to run his business.

We conclude that the evidence presented to the trial court was not sufficient to create a jury question as to whether Johnston was an employee of Country Mutual because there was not substantial evidence that Country Mutual reserved the right to direct the method and manner of Johnston's work. This Court has stated previously that "the one for whom the work is done may reserve the right to supervise the one doing the work, for the purpose of determining if the one doing the work is performing in conformity with the contract, without converting the relationship into that of master-servant." Shaw, 630 So. 2d at 403 (citing Spell v. ConAgra, Inc., 547 So. 2d 501 (Ala. 1989)); see generally Ex parte Union Camp Corp., 816 So. 2d 1039 (Ala. 2001). Independent contractors, as the name implies, engage in contractual relationships but otherwise work independently, controlling the direction and the performance of their own work. Any oversight of an independent

contractor's work is governed by contractual requirements to the mutual benefit of both parties and rarely creates an employer-employee relationship. Johnston's status as an independent contractor must be respected, not only based on the specific terms of his agent's agreement with Country Mutual, but also based on the facts and circumstances of the minimal, if any, control Country Mutual retained over Johnston's business activities. His relationship with Country Mutual, viewed in its entirety, shows little indicia of an employer-employee relationship.

Furthermore, even if we were to assume that Johnston was an employee of Country Mutual, there was not substantial evidence before the trial court showing that the underlying accident occurred within the line and scope of Johnston's employment. "An act is within an employee's scope of employment if the act is done as part of the duties the employee was hired to perform or if the act confers a benefit on his employer." Hulbert v. State Farm Mut. Auto. Ins. Co., 723 So. 2d 22, 23 (Ala. 1998). The conduct "must not be impelled by motives that are wholly personal or to gratify his own feelings or resentment, but should be in promotion of the

business of his employment." Solmica of the Gulf Coast, 285 Ala. at 401, 232 So. 2d at 643.

The underlying accident occurred at approximately 11:00 a.m. Earlier that morning, Johnston left his office to attend a court hearing at 9:00 a.m. for an unrelated case and then drove to his attorney's office. In response to an interrogatory, Johnston stated that he "had stopped by Target [department store] on Bailey Cove Road to buy diapers, and [he] was headed home" when the accident occurred. At his deposition, Johnston again stated that he was driving home for lunch when the accident occurred.

Based on the location of the accident in relation to Johnston's office, Donaldson asserts that Johnston was actually returning to his office when the accident occurred; however, no direct evidence was produced to substantiate this claim. Donaldson also notes that Johnston's telephone records indicate that he made multiple work-related telephone calls from his personal cell phone within an hour before the accident.[2] Donaldson claims that these phone calls show that

[2]We note that it is undisputed that Johnston was not using his cell phone at the time of the accident. The phone records submitted indicate that the last phone call from Johnston's cell phone before the accident began at 10:44 a.m. and lasted

Johnston was engaged in duties of his alleged employment with Country Mutual at the time of the accident, rather than in wholly personal activities. Additionally, Donaldson asserts that Johnston's trip conferred a benefit to Country Mutual because, at the time of the accident, magnetic signs were affixed to each side of Johnston's vehicle displaying a "Country Financial" logo above Johnston's name and telephone number.

In support of his argument, Donaldson cites our recent decision in Hinkle Metals & Supply Co. v. Feltman, [Ms. 1170512, February 15, 2019] __ So. 3d __ (Ala. 2019), which he claims is applicable here. That case similarly involved a respondeat superior claim arising from an automobile-pedestrian accident. At trial, evidence was presented showing that the employee tortfeasor was compensated for travel related to company business and that his job duties sometimes required him to travel to pick up items from the company's warehouse; further, circumstantial evidence was presented from which one could reasonably infer that the trip during which the accident happened was at least in part to benefit the

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83 seconds.

employer by picking up an item sold later that day. Hinkle, __ So. 3d at __. The trial court denied the employer's motion for a judgment as a matter of law, and the jury found the employer vicariously liable. This Court held that sufficient evidence was presented to require a jury determination of whether the employee tortfeasor was acting within the line and scope of his employment at the time of the accident. __ So. 3d at __.

In this case, unlike in Hinkle, there is not sufficient evidence presented from which it could reasonably be inferred that Johnston was traveling for a purpose related to his alleged employment. There was no evidence indicating that Johnston's trip was connected to the work-related phone calls made before the accident. Likewise, Donaldson's claim that Johnston was actually returning to his office, as opposed to driving home, is not, by itself, material. The general rule is that an employee, traveling to and from his place of work, is not engaged in work for his employer but is acting solely for his own purpose. Atlanta Life Ins. Co. v. Stanley, 276 Ala. 642, 647, 165 So. 2d 731, 735 (1964); Smith v. Brown-Service Ins. Co., 250 Ala. 613, 615, 35 So. 2d 490, 493 (1948). Moreover, Johnston was not required by Country Mutual to place

the magnetic signs displaying the "Country Financial" logo on his vehicle; rather, Johnston did so in his own discretion. Thus, there is no evidence to suggest that Johnston's trip bestowed any benefit to Country Mutual.

Conclusion

We affirm the summary judgment entered by the trial court; Donaldson failed to submit substantial evidence of the existence of a genuine issue of material fact to support his claims against Country Mutual and to defeat Country Mutual's summary-judgment motion.

AFFIRMED.

Bolin, Wise, and Stewart, JJ., concur.

Parker, C.J., concurs in the result.