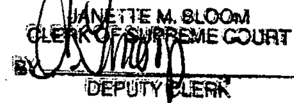
IN THE SUPREME COURT OF THE STATE OF NEVADA

LAVAR ANTHONY WINSOR,
Appellant/Cross-Respondent,
vs.
WORLD MARKETING ALLIANCE, INC.; AND R. SPENCER VAN PELT,
Respondents,
and
JULIANA SMITH,
Respondent/Cross-Appellant.

No. 44847

FILED



ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal and cross-appeal from a district court judgment entered pursuant to a bench trial in a tort action. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Respondent/cross-appellant Juliana Smith instituted the underlying action based on the alleged failure of respondent World Marketing Alliance, Inc. (WMA) and two of its insurance agents, respondent R. Spencer Van Pelt and his alleged supervisor, appellant/cross-respondent Lavar Anthony Winsor, to replace her husband's (now deceased) $500,000 life insurance policy with a $1 million life insurance policy.

According to Mrs. Smith, her husband's application for additional life insurance coverage was cancelled because of (1) Van Pelt's failure to schedule a supplemental electrocardiogram and (2) Van Pelt's failure to submit a supplemental financial statement. The electrocardiogram and financial statement were required by the insurance

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underwriter in evaluating Mrs. Smith's husband's application. Because the application was cancelled and no policy was ever issued, Mrs. Smith was unable to collect $1 million in proceeds from the underwriter when her husband passed away. As a result, she instituted the underlying action, naming WMA in the action based on a theory of vicarious liability and negligence. She included Van Pelt based on his alleged negligence in processing her husband's application. She further included Winsor on a theory of negligent training and supervision, as he was allegedly responsible for training and supervising Van Pelt. Mrs. Smith settled with Van Pelt and WMA before trial and the district court entered a good faith determination. A bench trial proceeded on the claims against Winsor only. Following a five-day bench trial, the district court entered judgment against Winsor.

Negligent training and supervision

This appeal presents the question of whether Winsor had a duty to train and supervise Van Pelt. The question of whether there is a duty to act is a question of law that this court reviews de novo.[1]

Generally, an employer has "a duty to use reasonable care in the training, supervision, and retention of his or her employees to make sure that the employees are fit for their positions."[2] More importantly, "[i]t is a basic tenet that for an employer to be liable for negligent hiring, training, or supervision of an employee, the person involved must actually

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[1]See Lee v. GNLV Corp., 117 Nev. 291, 295, 22 P.3d 209, 212 (2001).

[2]Hall v. SSF, Inc., 112 Nev. 1384, 1393, 930 P.2d 94, 99 (1996) (citing 27 Am. Jur. 2d Employment Relationship §§ 475-76 (1996)).

be an employee."[3] To be considered as an employee, generally there must be some non-delegable duty on the part of the employer or principal,[4] or the principal should (1) have the power to select or engage the employee, (2) pay salary or wages to the employee, (3) have the power to dismiss the employee, and (4) have the ability to control the acts of the nonemployee.[5] For example, where an insurance agency acts on its own initiative in negotiating and executing insurance contracts, it is not acting as an employee of the insurance underwriters.[6] However, this court has held that a hospital may be liable for negligently supervising nonemployee physicians who have staff privileges.[7]

Winsor cites to several cases to support the proposition that an independent contractor does not have a duty to supervise or train another

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[3]Rockwell v. Sun Harbor Budget Suites, 112 Nev. 1217, 1226, 925 P.2d 1175, 1181 (1996).

[4]Id. at 1224, 925 P.2d at 1180.

[5]State Div. of Human Rights v GTE Corp., 487 N.Y.S.2d 234, 235 (App. Div. 1985); see National Convenience Stores v. Fantauzzi, 94 Nev. 655, 657-58, 584 P.2d 689, 691 (1978); see also Rockwell, 112 Nev. at 1227, 925 P.2d at 1182.

[6]See Grand Hotel Gift Shop v. Granite State Ins. Co., 108 Nev. 811, 815-16, 839 P.2d 599, 602 (1992).

[7]Oehler v. Humana Inc., 105 Nev. 348, 350, 775 P.2d 1271, 1272 (1989) (liability for the negligent supervision of nonemployee physicians may be imposed on hospitals under the doctrine of corporate responsibility, because hospitals have a duty to monitor and supervise the treatment of their patients). However, even assuming that the doctrine of corporate responsibility could apply to the case at bar, it would not apply to an individual independent contractor like Winsor.

independent contractor, citing Wells, Inc. v. Shoemake,[8] Hanneman v. Downer,[9] Thomas v. Riverside Resort & Casino,[10] and Kaldi v. Farmers Insurance Exchange.[11] The first three cases stand for the proposition that an individual or entity is not an employee unless there is some form of master-servant or superior-subordinate relationship. However, these three cases are factually dissimilar from the case at bar. Even though Kaldi presents a dissimilar fact pattern, the analysis presented in that case is pertinent to the case at bar.

In Kaldi, Steven Kaldi, an insurance agent, entered into an exclusive agency agreement with Farmers Insurance wherein Kaldi agreed to sell only Farmers' insurance products in exchange for a

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[8]64 Nev. 57, 65, 177 P.2d 451, 455-56 (1947) (holding that a governmental subdivision is not vicariously liable for the negligence of a truck driver where the truck driver was an employee of an independent trucking company that had been hired by the subdivision to provide shipping services).

[9]110 Nev. 167, 174-75, 871 P.2d 279, 284 (1994) (holding that a landowner is not vicariously liable for the negligence of an independent surveyor who was contracted to perform a survey of real property because there was no master-servant relationship and because surveyors must perform their work with precision and expertise).

[10]110 Nev. 1283, 1284, 885 P.2d 575, 575-76 (1994) (reversing summary judgment in favor of a hotel in a negligence action, where the bellman negligently injured a guest and the bellman was an employee of an independent valet company that the hotel hired to run its valet services, because the agreement between the hotel and the valet company stated that the hotel would assume all "public liability").

[11]117 Nev. 273, 21 P.3d 16 (2001).

commission on any new insurance sales he made.[12] The agreement further specified that Farmers would provide "training, forms and advertising assistance to Kaldi's business."[13] The agreement additionally stated that Kaldi would operate as an independent contractor and that he could work as many hours and solicit whatever customers he may choose.[14] Farmers Insurance terminated the exclusive agency agreement approximately sixteen years later.[15] Kaldi filed a complaint based on breach of contract; he further alleged that the exclusive agency agreement created an employer-employee relationship between himself and Farmers Insurance. The district court dismissed Kaldi's complaint, and Kaldi appealed.[16] This court affirmed, concluding that the agreement plainly and unambiguously stated that Kaldi was an independent contractor, and that none of its terms were intended to be construed to form an employee-employer relationship.[17] This court noted that, "[a]dditionally, under the Agreement, Kaldi was responsible for maintaining his own offices, supervising his employees, determining the hours of operation for the business, providing supplies, etc."[18]

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[12]Id. at 275, 21 P.3d at 18.

[13]Id. at 275, 21 P.3d at 17-18.

[14]Id. at 276-77, 21 P.3d at 18.

[15]Id. at 277, 21 P.3d at 18-19.

[16]Id. at 277-78, 21 P.3d at 19.

[17]Id. at 278-79, 21 P.3d at 20.

[18]Id. at 279, 21 P.3d at 20.

As in Kaldi, here we conclude that the requisite employer-employee relationship did not exist between Winsor and Van Pelt.[19]

Winsor recruited Van Pelt in 1998 as an independent contractor to participate in WMA's pyramid scheme. The testimony indicates that Winsor provided Van Pelt with some training and guidance, and that he subsequently received a percentage of Van Pelt's commissions. However, Winsor did not pay Van Pelt a salary or an hourly wage for his services. Winsor did not have the authority to promote or terminate Van Pelt. Winsor did not have the ability to set Van Pelt's hours. Nor did Winsor control the methods or details of Van Pelt's work.

Winsor did receive a pecuniary benefit from Van Pelt's work, in that he received a percentage of Van Pelt's commissions. However, the mere receipt of an economic benefit from an independent contractor's work is not enough to convert an independent contractor relationship into an employee-employer relationship; it is merely one of many factors the court should consider.[20] Van Pelt was not Winsor's employee, as required by Rockwell.[21] Van Pelt was an independent contractor and Winsor did not possess the requisite authority or control over Van Pelt's actions to

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[19]Other persuasive authority indicates that the obligation of one contractor to supervise the work of another is imposed only by contract, not by law. See 13 Am. Jur. 2d Building, Etc. Contracts § 140 (2007).

[20]Cf. Matter of Sweeney v Board of Educ. of Rocky Point Union Free School Dist., 491 N.Y.S.2d 455, 456 (App. Div. 1985).

[21]112 Nev. at 1226, 925 P.2d at 1181. We do not address whether Van Pelt was WMA's "employee" or agent, although Van Pelt's relationship with WMA was certainly distinguishable from Van Pelt's relationship with Winsor.

otherwise establish a master-servant, employer-employee relationship.[22] Without the requisite master-servant relationship or some non-delegable duty,[23] Winsor cannot be held liable for the negligent hiring, training or supervision of Van Pelt.[24]

Consequently, we reverse the judgment against Winsor.[25]

Good faith settlement

Winsor challenges the good faith settlement between Smith, WMA and Van Pelt. This court reviews a good faith settlement

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[22]Winsor did sign a "Co-Leadership Agreement" indicating that Winsor may have assumed an obligation to provide "leadership and training" to Van Pelt at one time. However, this agreement did not appear to give Winsor any real authority or control over Van Pelt, and it was not enough to create an employer-employee relationship between the two independent contractors.

[23]Winsor did not owe Mrs. Smith or her husband a non-delegable duty because they were not his clients; they were Van Pelt's clients. Even assuming, arguendo, that Winsor had a legally cognizable duty to train and supervise Van Pelt, we are not convinced that Winsor's failure to train and supervise Van Pelt actually or proximately caused the damages alleged here.

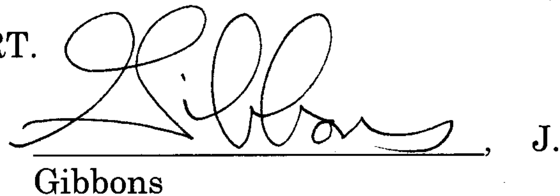
[24]We are aware that under the Restatement, an individual can voluntarily assume a duty to assist another. See Restatement (Second) of Torts § 323 (proposes that where one voluntarily assumes a duty to assist another, the assisting party could be liable for physical harm resulting from any failure to competently perform that duty). However, the Restatement only mentions liability for physical harm, and it says nothing about harm to pecuniary interests. Here, Winsor's alleged negligence caused no physical harm to either Mrs. Smith or her husband.

[25]As to the district court's limitation of damages, the issue is now moot as to Winsor. However, we affirm the limitation of damages in all other respects.

determination for an abuse of discretion.[26] This court considers several factors in determining whether a settlement is made in good faith, including: (1) the amount of the settlement, (2) the allocation of the settlement proceeds among the plaintiffs, (3) the insurance policy limits of the settling defendants, (4) the financial condition of the settling defendants, and (5) the existence of collusion, fraud or tortuous conduct aimed at prejudicing the non-settling defendants.[27]

After reviewing the record and the parties' arguments, we conclude that the district court did not abuse its discretion when it determined that Smith entered into a good faith settlement with WMA and Van Pelt. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.



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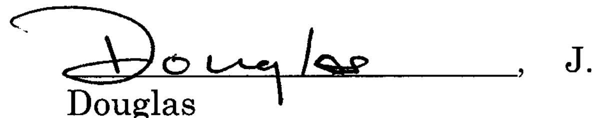
Gibbons



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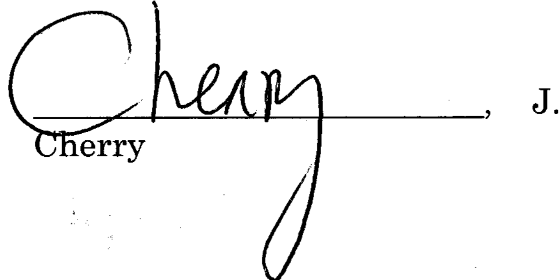

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[26]Velsicol Chemical Corp. v. Davidson, 107 Nev. 356, 360, 811 P.2d 561, 563 (1991).

[27]In re MGM Grand Hotel Fire Litigation, 570 F. Supp. 913, 927 (D. Nev. 1983); see also Velsicol, 107 Nev. at 358-59, 811 P.2d at 562.

cc: Hon. Valorie Vega, District Judge
Lester H. Berkson, Settlement Judge
Olson, Cannon, Gormley & Desruisseaux
Holland & Hart
Royal Jones Miles Dunkley & Wilson
Eighth District Court Clerk