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Geedman v. Rush Transport, Inc.

Not Reported in S.W.3d, 2000 WL 704978
Tex.App.-Hous. (1 Dist.),2000.
June 01, 2000 (Approx. 2 pages)

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Court of Appeals of Texas, Houston (1st Dist.).
Sharon GEEDMAN and Ronald Geedman, Appellants,
v.
RUSH TRANSPORT, INC., and DHL Airways, Inc., d/b/a DHL Worldwide Express, Appellees.
No. 01-98-01102-CV.
June 1, 2000.

On Appeal from the 269th District Court, Harris County, Texas, Trial Court Cause No. 95-020742.

Panel consists of Justices O'CONNOR, WILSON, and ANDELL.

OPINION ON MOTION FOR REHEARING

ANDELL.
*1 Appellant has moved for rehearing in this cause. We deny the motion for rehearing but withdraw our opinion of December 2, 1999 and substitute this in its place.

This is an appeal of a personal injury suit brought by appellants/plaintiffs, Ronald and Sharon **Geedman**, against appellees/defendants, **Rush** Transport, Inc. and DHL Airways, Inc. d/b/a DHL Worldwide Express, after an auto accident in which a **Rush** driver broadsided the **Geedmans**' car. The **Geedmans** present four issues for review: (1) whether the jury's award of no damages, despite uncontroverted evidence of physical injury, was unjust; (2) whether the trial court erred in ruling that evidence of **Rush** driver William Nieland's driving history and habits was inadmissible, then rendering a directed verdict in favor of **Rush** on the negligent hiring claim; (3) whether the jury's finding that Nieland was not an employee of **Rush**, but was instead an independent contractor, was against the great weight and preponderance of the evidence; and (4) whether the trial court erred in rendering a directed verdict on the issue of whether **Rush** was DHL's agent. We affirm.

Facts

In the fall of 1994, Ronald Geedman was driving near the airport with his wife, Sharon, as a passenger. Their car was broadsided by a truck driven by Nieland, a Rush driver, who was on his way to deliver packages to the airport. Sharon Geedman suffered serious injuries, including a broken pelvis. The Geedmans sued for negligence and gross negligence, respondeat superior, negligent hiring, and negligent hiring of a contractor.

The parties disputed at trial who had a green light at the time of the accident. The jury found that Ronald Geedman and Nieland were each 50% at fault and awarded no damages. Nieland's driving record is poor; in the 14-year span before this accident, he was involved in two other accidents, got a speeding ticket, and was convicted of not carrying insurance and driving while intoxicated (DWI). The trial court ruled that evidence about Nieland's driving record was inadmissible and rendered a directed verdict on the issue of negligent hiring; it also rendered a directed verdict on the issue of agency.

The trial court granted the **Geedman's** motion for new trial against Nieland; thereafter, the **Geedmans** and Nieland settled, and this appeal against **Rush** and DHL ensued.

Was Nieland an Independent Contractor?

In issue two, the Geedmans contest the factual sufficiency supporting the jury's finding that Nieland was an independent contractor. We consider and weigh all of the evidence and will not set aside the verdict unless it is so contrary to the overwhelming weight of the evidence as to be manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex.1986).

The critical test distinguishing an employee from an independent contractor is whether the employer has the right to control the progress, details, and methods of operations of the employee's work. *Thompson v. Travelers Indem. Co.*, 789 S.W.2d 277, 278 (Tex.1990). Some of the factors considered by courts in making this determination include: (1) the independent nature of the business; (2) the employer's obligation to furnish necessary tools, supplies, and materials to perform the job; (3) the employee's right to control the progress of the work, except for the final result; (4) the length of time of the employment; and (5) whether the employee is paid by time or by the job. *Farrell v. Greater Houston Transp. Co.*, 908 S.W.2d 1, 3 (Tex.App.-Houston [1st Dist.] 1995, writ denied).

***2** Nieland and Rush executed a written contract identifying Nieland as an independent contractor, not an employee. When, as here, there is a contract that states a person is an independent contractor, and does not expressly reserve the right of control to the alleged employer, the agreement is ordinarily dispositive on the issue unless the contact is shown to be a subterfuge. *Yeager v. Drillers, Inc.*, 930 S.W.2d 112, 117 (Tex.App.-Houston [1st Dist.] 1996, no writ). The evidence in regard to these factors, including the critical factor of who controlled the progress and details of the work, was as follows:

(1) *Nature of the Business:* Rush delivers packages in Houston and surrounding Texas areas for DHL, a world-wide shipping company. Rush hires drivers to pick up and drop off packages.

(2) *Tools, Supplies, and Material Furnished:* Rush owns and provides some trucks for oversized loads, but each driver is expected to use his personally-owned truck the majority of the time. The driver, not Rush, is responsible for upkeep, repairs, and insurance on his truck. Rush supplies a partial uniform (a T-shirt), a DHL 1-800 number, traffic and weather information, assistance in filling out shipping forms, and a pager.

(3) *Control of the Job's Progress, Except the Final Result:* Each driver is expected to deliver his packages within a certain time frame. Within that limitation, the driver determines the order of delivery, the streets and route to take, and when and where he will stop for lunch. Driving decisions such as speed are made only by the driver. When asked if he was employed by Rush, Nieland said, "Yes." He also agreed he was available at Rush facilities to work from 6:30 a.m. to 8 p.m. each day, and that he "reported to" Mr. Gonzales.

(4) *Length of Employment:* Indefinite.

(5) *Paid by Time or Job?* Rush pays its drivers on a weekly basis for the time each spends delivering packages.

In addition to these factors, the record shows that Rush fills out income tax form 1099 for each driver, not the W-2 required for employees. It does not provide insurance benefits, sick pay, or vacation pay. In theory, assuming he had the time and work at Rush was slow, Nieland could have worked as a driver for other package delivery companies, although at the time he worked exclusively for Rush. Nieland contended he performed supervisory duties; Rush insisted that, although Nieland was a senior driver and did assist in performing certain day-to-day functions, he had not been hired as a supervisor; rather, he was hired as an independent contractor to deliver packages.

The trier of fact is the sole judge of the credibility of the evidence and the weight to be given the witnesses' testimony. *Cain*, 709 S.W.2d at 176. Evidently, the jury believed Nieland was an independent contractor and that the contract between Nieland and Rush was not a sham. Based on

the evidence in this record, the jury's finding is not so contrary to the great weight and preponderance of the evidence as to be manifestly unjust.

*3 We overrule issue two.

Negligent Hiring

In issue three, the Geedmans contend the trial court erred in rendering a directed verdict on the issue of negligent hiring, after it ruled that Nieland's driving history was inadmissible. Nieland has a valid, current Texas driver's license, and the president of Rush testified he knew Nieland to be "a good delivery driver." However, by his own admission, Nieland's driving habits and records are below par. Rush admitted it did not investigate Nieland's official DPS driving record at the time it originally hired him in 1992. Had it inspected it, it would have found only a 1988 conviction for driving while intoxicated.

The **Geedmans** argue (1) **Rush** had a duty to thoroughly investigate Nieland's driving history and habits, beyond checking his official record; (2) they breached this duty; and (3) the breach resulted in their injuries. A person who employs an independent contractor has a duty to use ordinary care in selecting the contractor when the work to be performed involves a risk of physical harm if not skillfully performed. *Yeager,* 930 S.W.2d at 117. However, the responsibility for conducting a task in a safe manner rests with the independent contractor when the activity is conducted by, and is under the control of, an independent contractor, and when the danger arises out of the performance of the task. *In re Ethyl Corp.,* 975 S.W.2d 606, 615, (Tex.1998). For a negligent act or omission to be the proximate cause of an injury, the injury must be the natural and probable result of the particular act or omission, thus an employer cannot be liable for negligent hiring unless the same condition that made the hiring negligent also caused the injury. *See Bell v. Campbell,* 434 S.W.2d 117, 120 (Tex.1968). Even if we assume **Rush** had, at the least, a duty to inspect Nieland's official driving record, and breached that duty, the **Geedmans** cannot prevail. The focus in negligence cases is directed to the issue of proximate cause, which courts now determine as a matter of law, not fact. *Doe v. Boys Clubs of Greater Dallas, Inc.,* 907 S.W.2d 472, 477-78 (Tex.1995).

If the breach of a duty does no more than furnish the condition making an injury possible, it is not the proximate cause of the injury as a matter of law. *Id.* **Rush's** breach of any duty to investigate Nieland's driving record in 1992 did no more than furnish the condition that made the 1994 injury to Sharon **Geedman** possible. Had Rush inspected Nieland's official driving record, it would have discovered a single conviction for DWI four years earlier. This information was not sufficient for Rush to foresee that Nieland would be involved two years later in a traffic accident in which alcohol was not a factor.

We hold that the trial court did not err in rendering a directed verdict.

We overrule issue three.

Agency

In issue four, the **Geedmans** contend the trial court erred in rendering a directed verdict on the issue of whether **Rush** was DHL's agent. DHL could only be liable if Rush were liable. Given our disposition of issue two, we hold the trial court did not err in rendering a directed verdict on the issue of agency.

*4 We overrule issue four.

Zero Damages

In issue one, the Geedmans complain of the jury's failure to award damages despite uncontroverted, objective physical evidence of injury. Although the Geedmans correctly note that an award of no

damages is *per se* reversible, this is true only in regard to the person whom the jury found to be negligent-Nieland. The Geedmans and Nieland have settled, and he is not a party to this appeal. No recovery is allowed unless liability has been established; in the absence of liability, the question of damages becomes immaterial. *Turner v. Lone Star Indus.*, 733 S.W.2d 242, 246 (Tex.App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.) (because jury did not find defendant was negligent, failure to find damages harmless).

If we had held that the jury's finding that Nieland was an independent contractor was manifestly unjust, or that the trial court erred in rendering a directed verdict that Rush is not DHL's agent, we would need to address this issue. Because the jury did not find that Rush or DHL were liable, and we have sustained these findings, the question of damages is immaterial in regard to these defendants.

We overrule issue one.

We affirm the judgment.

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