Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-100

JUNE TERM, 2004

Larry Drown v. Granite Importers, Inc. v. David Drown	}	APPEALED FROM: Washington Superior Court DOCKET No. 217-4-02 Wncv Trial Judge: Hon. Geoffrey W. Crawford

In the above-entitled cause, the Clerk will enter:

Plaintiff Larry Drown, who filed a lawsuit claiming that defendant/third-party plaintiff Granite Importers, Inc. was responsible for damage to his excavator allegedly occurring while the equipment was being transported in defendant' s truck by defendant' s employee, appeals the superior court's decision granting summary judgment to defendant. We affirm.

The material facts are not in dispute. On January 6, 2001, third-party defendant David Drown, who was an employee of defendant at the time, hauled an excavator owned by plaintiff from Lake Bomoseen, Vermont approximately seventy miles to Northfield, Vermont. Defendant' s principal, Jack Colgan, had given Drown permission to use a company truck and trailer to move the excavator on behalf of Robert Langlois, who was borrowing or leasing the equipment from plaintiff. Drown was not hauling the equipment on behalf of defendant, and defendant was not paid for that service. Plaintiff alleges that the excavator was damaged when it struck a bridge overpass because it was negligently loaded onto the trailer. Plaintiff sued defendant, and defendant, in turn, filed a third-party complaint against David Drown. The legal issue raised in the parties' cross-motions for summary judgment was whether defendant is liable for the actions of Drown, who was not operating the equipment on behalf of his employer, based on a theory of apparent authority.

The superior court granted summary judgment to defendant, ruling that plaintiff failed to demonstrate an agency relationship between defendant and David Drown based on apparent authority. The court concluded that (1) a statement Drown allegedly made indicating that defendant had plenty of insurance was inconsequential because it was not made by the principal; and (2) the fact that the truck Drown was driving had defendant' s name on it was not enough, standing alone, to demonstrate an agency relationship. On appeal, plaintiff argues that defendant is liable for its employee' s negligence because the company gave the employee permission to use a commercial vehicle bearing its name to transport heavy equipment owned by a third-party who had no knowledge of the scope of the employer' s permission but rather relied upon the outward manifestations of the employer " its name on the truck " and the comments of the employee.

Like other courts, this Court has endorsed the rule that an employer is generally not liable for the negligent acts of its employee who uses the employer' s vehicle, with or without the employer' s consent, for personal business. See Anderson v. Toombs, 119 Vt. 40, 44-45 (1955) (employer is not liable for negligent act of employee unless it appears that act complained of was done within scope of employment and in furtherance of employer' s business); see also Broadway v. Kelley Bros. Contractors, Inc., 803 So.2d 1155, 1156 (Miss. 2000) (when employer merely loans vehicle to employee, and employee uses it for personal business in which employer has no interest, employer is not liable for

negligent acts of employee while thus using borrowed vehicle); Sauriolle v. O' Gorman, 163 A. 717, 719-20 (N.H. 1932) (it is well settled that employer is not liable for negligent operation of vehicle loaned to employee for employee' s business); John H. Shuman Estate v. Weber, 419 A.2d 169, 174 (Pa. Super. Ct. 1980) (it is well established that employer does not become liable for employee' s negligent act due to employer habitually allowing employee to have personal use of employer' s instrumentality; liability is imposed on employer only when instrumentality is used for purpose of advancing employer' s business interest); 1 Restatement (Second) of Agency § 238 (1958) (" Except where he is at fault or fails to perform a nondelegable duty, a master is not liable for harm caused by the use of instrumentalities entrusted by him to a servant when they are not used in the scope of employment."). Nevertheless, an employer may be held vicariously liable on a theory of respondeat superior for the negligence of an employee who is acting within the actual or apparent authority of the employer. See Connors v. Oaks, 642 A.2d 245, 249 (Md. Ct. Spec. App. 1994); see also 1 Restatement (Second) of Agency § 238, cmt. a (" The fact that the instrumentality appears to be used in the master' s employment is immaterial except as persons are misled into reliance upon the existence of the relation of master and servant and thereby suffer harm."); 1 Restatement (Second) of Agency § § 265(1), 267 (principal is subject to liability for torts resulting from reliance on statements or other conduct within agent' s apparent authority; one who represents another as agent, causing third person to justifiably rely on skill of apparent agent, is liable to third person for harm caused by agent). In such situations, liability may be established even though the employee is acting outside the scope of his employment. See 1 Restatement (Second) Agency § 219(2)(d) (master is not subject to liability for torts of servants acting outside scope of employment unless servant purported to act or speak on behalf of principal and there was reliance on apparent authority).

Plaintiff' s theory is that he reasonably assumed that David Drown was transporting the excavator as an agent of defendant because the truck Drown was driving had defendant' s name on it, and, when plaintiff expressed concern about the way David Drown was loading the truck, Drown told him not to worry because " we have plenty of insurance." According to plaintiff, it was reasonable for him to assume that Drown was operating the tractor trailer on behalf of the company whose name was on the truck because (1) he was performing the same type of work performed by defendant in its regular business, and (2) tractor-trailers require specialized training and licensing to operate, are subject to stringent state and federal regulations, and are capable of inflicting tremendous damage if they are not operated properly.

" ' As a general rule, apparent authority is relevant where the agent purports to exercise a power which he or she does not have, as distinct from where the agent threatens to misuse actual power.' " Doe v. Forrest, 2004 VT 37, & 23, 15 Vt. L. Wk. 125 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 759 (1998)). Apparent authority " derives from conduct of the principal, communicated or manifested to the third party, which reasonably leads the third party to rely on the agent' s authority." New England Educ. Training Serv. v. Silver St. P' ship, 148 Vt. 99, 105 (1987). An agent' s words or conduct cannot create apparent authority; rather such authority may be found where a third party relies upon the agent' s misrepresentation because of some misleading conduct by the principal " not the agent. Doe, 2004 VT 37, at & 23; Kimco Leasing Co. v. Lake Hortoina Props., 161 Vt. 425, 429 (1994) (" Statements of the agent are insufficient to create an apparent agency relationship."). As the trial court noted, merely displaying a trade name or logo does not, in and of itself, cloak an agent with apparent authority. See Theo & Sons, Inc. v. Mack Trucks, Inc., 729 N.E.2d 1113, 1121 (Mass. 2000) (citing cases); see also Searle v. Great N. Ry., 189 F. Supp. 423, 429 (D. Mont. 1960) (defendant entitled to summary judgment on tort claim where it did nothing other than to let employee use its marked truck for employee' s own purposes); but see Barnes v. Lee, 2003 WL 1666449, at *6 (Me. Super. Ct.) (unreported decision) (third party could reasonably assume that name on truck meant that agent was acting under apparent authority of defendant).

In the circumstances presented by this case, we conclude that plaintiff could not have reasonably relied upon the name on the truck and David Drown' s comment to assume that Drown was acting as an agent for defendant. See Doe, 2004 VT 37, & 23 (liability under doctrine of apparent authority exists only to extent it is reasonable for third person dealing with agent to believe that agent is acting under authority of principal); Hallock v. State, 474 N.E.2d 1178, 1181 (N.Y. 1984) (third party dealing with agent may rely upon appearance of authority only to extent that such reliance is reasonable). " The purpose underlying the doctrine of apparent authority is ' to protect an innocent third party from difficulties in dealings with . . . an agent whose actual authority is cut down by limitations unknown to the person with whom he is dealing.' " Lakeside Equip. Corp. v. Town of Chester, 173 Vt. 317, 325 (2002) (quoting Blitz v. Breen, 132 Vt. 455 (1974)). Here, however, plaintiff had lent the excavator to Langlois and had entrusted the details of having it

transported to same. It was unreasonable for plaintiff to assume that Drown was acting on behalf of defendant in transporting his excavator, based solely on the name on the truck and an offhand comment by the driver. Accordingly, the superior court properly granted defendant summary judgment. See Luce v. Chandler, 109 Vt. 275, 280 (1937) (where facts are undisputed and create only one reasonable inference, court must determine whether those facts create agency).

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Paul L. Reiber, Associate Justice