

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0069-14T1

GLENN TILTON and AMY TILTON,
his wife,

Plaintiffs-Appellants,

v.

NATHANIEL J. GOODALL and
SUBCONTRACTING CONCEPTS, INC.,

Defendants,

and

SAME DAY DELIVERY SERVICE, INC.
and RITE AID PHARMACY,

Defendants-Respondents.

Submitted June 1, 2015 - Decided August 25, 2015

Before Judges Lihotz and Rothstadt.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Docket No. L-
2485-11.

Hendrickson & Edelstein, attorneys for
appellants (Steven M. Edelstein, on the
briefs).

Zarwin, Baum, DeVito, Kaplan, Schaer &
Toddy, P.C., attorneys for respondents
(Timothy P. Mullin, on the brief).

PER CURIAM

Plaintiffs Glenn and Amy Tilton appeal from a July 25, 2014 Law Division order, denying reconsideration of the summary judgment dismissal of their complaint for damages resulting from personal injuries caused by the negligence of defendants Same Day Delivery Service, Inc. (Same Day) and Rite Aid of New Jersey, Inc. (Rite Aid). Plaintiffs alleged, among other claims, Rite Aid and Same Day negligently hired defendant Nathaniel Goodall, making them liable for the consequences of Goodall's assaultive conduct while delivering a prescription to a Rite Aid customer.

On appeal, plaintiffs challenge the Law Division's dismissal of their complaint, arguing the judge erred finding Rite Aid and Same Day did not negligently hire Goodall, who was not their employee. Plaintiffs maintain the record presents disputed material facts surrounding Goodall's hiring and employment status, which can only be resolved by a factfinder, obviating entry of summary judgment.

We have reviewed the arguments advanced on appeal, in light of the record and applicable law. We reject plaintiffs' contentions and affirm.

These undisputed facts are found in the summary judgment record, which we view in the light most favorable to plaintiffs, the non-moving parties. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405-06 (2014).

Same Day, a logistics courier company, entered into a 2008 service agreement with Rite Aid to provide services, including prescription delivery, to Rite Aid customers. Rite Aid issued delivery schedules to Same Day, which provided them to contracted drivers. Drivers picked up items for delivery from and were given destination addresses by Rite Aid.

Same Day retained the services of drivers through defendant Subcontracting Concepts, Inc. (SCI).¹ SCI operates as a third-party administrator, brokering payment terms between couriers and companies in the transportation and logistics industry. Same Day contracted with SCI to obtain delivery services for Rite Aid, one of its clients.

Goodall signed a six-page "Independent Contractor Owner/Operator Agreement" with SCI on January 5, 2009. The agreement required Goodall, at his sole expense, to obtain ownership of a vehicle, as well as assume obligations for payment of "tolls, fuel, oil, tires, repairs, garaging, parking and maintenance of vehicle(s) and other equipment." SCI would invoice Same Day for completed assignments, then paid Goodall based upon a negotiated rate. Prior to utilizing a driver's services, SCI screened prospective drivers to verify they were licensed and had an insured vehicle. Same Day conducted

¹ SCI was separately granted summary judgment. Plaintiffs' appeal does not challenge the dismissal of claims against SCI.

background checks of prospective drivers, including Goodall, performed through an unspecified internet provider.

On September 16, 2009, Glenn² arrived at Maple Lake Campground in Jackson, to pick up Amy, who was accompanied by their two children. As he backed away from the campground office, Glenn noticed a vehicle, later determined to be driven by Goodall, speeding around the corner. As Goodall reached a point "adjacent" to plaintiffs' vehicle, Glenn yelled for him to "[s]low down." After passing plaintiffs, Goodall stopped a short distance away and exited his vehicle. Glenn exited his vehicle and the two walked towards one another. When the two were separated by approximately twenty feet, Glenn noticed Goodall held a gun in his right hand, which was raised in his direction. Glenn "yelled back at [his] wife that he has a gun" and watched her push the children onto their vehicle's floor.

Fearful for the safety of his family, Glenn continued to walk toward Goodall, stating, "if you got a gun[,] you're gonna have to shoot me with it or I'm gonna take it from you." Without saying a word, Goodall placed the gun in his waistband, returned to his vehicle, and drove off. No shots were fired. Glenn scratched Goodall's license plate number into the sand and reported the incident to the Jackson Township Police Department.

² Because the parties share the same surname we have chosen to use their first names in our opinion to avoid confusion.

Goodall was apprehended and charged with several weapons offenses, including second-degree certain persons not to possess weapons. N.J.S.A. 2C:39-7(a). This charge was based on an earlier 2002 Burlington County conviction for drug related offenses.³ Pursuant to a negotiated plea agreement, Goodall was convicted of second-degree unlawful possession of a weapon for his conduct against plaintiffs and sentenced to a five-year prison term.

Plaintiffs' complaint against Goodall asserted general claims of assault, negligence, and loss of consortium and alleged specific claims for vicarious liability and negligent hiring against Rite Aid and Same Day. A default judgment was entered against Goodall on August 24, 2012.

Following discovery, Rite Aid and Same Day moved for the summary judgment dismissal of plaintiffs' complaint, which was granted. In a letter opinion filed with the May 28, 2014 order, the judge found plaintiffs failed to submit proofs showing Goodall was an employee of either defendant. Further, assuming he was an employee, the judge concluded Goodall's tortious "road

³ The 2002 charges, filed under Burlington County Indictment No. 02-01-0049, also included second-degree possession of a firearm while committing drug offenses. See N.J.S.A. 2C:35-4.1. Pursuant to the terms of a negotiated plea agreement, Goodall pleaded guilty to one drug charge and the weapons offenses were dismissed.

rage" did not conceivably fall within, or was even contemplated by, the scope of his employment. The judge also rejected plaintiffs' allegation Goodall's prior drug possession convictions substantiated their claim of negligent hiring. The judge noted, if considered an employee, Goodall had no prior violent offenses, stating he "was not convicted of a weapons offense or a violent crime from which a propensity of violence would be foreseeable."

Plaintiffs moved for reconsideration, arguing the judge overlooked evidence in the summary judgment record supporting plaintiffs' allegations of negligent hiring. They also presented new evidence, submitting the 2002 Burlington County indictment and negotiated plea agreement reflecting Goodall had been previously charged with second-degree possession of a weapon while possessing drugs. In a certification attached to the motion, plaintiffs stated:

The [c]ourt's ruling implie[d] that had . . . Goodall[] been previously convicted of an offense involving a weapon, that it would be foreseeable . . . he had a propensity for violence and, therefore, the claim for negligent hiring would stand.

Plaintiffs conceded evidence of the Burlington County weapons charge was not submitted prior the entry of summary judgment, but argued "it [wa]s at least now before the [c]ourt and . . . the evidence of that conviction would supply the needed evidence for a reasonable [factfinder] to conclude that

there may have been a propensity for violence." Plaintiffs maintained Rite Aid and Same Day were liable for negligent hiring because they (1) knew or should have known of Goodall's dangerous propensities, based on his prior weapons charge, and (2) had contractually agreed to comply with federal and state regulations, which prohibited allowing access to controlled substances to "any person who has been convicted of a felony offense relating to controlled substances."⁴

Defendants opposed reconsideration, arguing plaintiffs' claims were grounded upon an employer-employee relationship and "it was clear . . . Goodall was an independent contractor." Specifically addressing Goodall's 2002 guilty plea to drug offenses, defendants challenged its untimely submission as insufficient proof of the necessary elements of duty and breach.

After considering the newly submitted evidence of Goodall's previous weapons conviction, the judge denied plaintiffs' motion. He concluded the documents were "sufficient to permit a rational factfinder to infer the elements necessary to establish

⁴ Pursuant to 21 C.F.R. § 1301.76, which is entitled "Other security controls for practitioners," a "registrant shall not employ, as an agent or employee who has access to controlled substances, any person who has been convicted of a felony offense relating to controlled substances. . . ." 21 C.F.R. § 1301.76(a). Further, the regulations "recommend" pharmacies screen potential employees' criminal records and question them directly for past drug use; they do not mandate it. See 21 C.F.R. § 1301.90, § 1301.93.

liability on negligent hiring in the context of this incident," however, as previously noted when granting summary judgment, "no employer/employee relationship . . . existed that would in fact give rise to a negligent hiring." An order memorializing the judge's decision was entered on July 25, 2014. This appeal ensued.

Appellate review of a trial court's summary judgment determination is well-settled.

In our de novo review of a trial court's grant or denial of a request for summary judgment, we employ the same standards used by the motion judge under Rule 4:46-2(c). Brickman Landscaping, supra, [219] N.J. [at 406]. First, we determine whether the moving party has demonstrated there were no genuine disputes as to material facts, and then we decide whether the motion judge's application of the law was correct. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div.), certif. denied, 189 N.J. 104 (2006). In so doing, we view the evidence in the light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). Factual disputes that are merely "'immaterial or of an insubstantial nature'" do not preclude the entry of summary judgment. Ibid. (quoting Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)). Also, we accord no deference to the motion judge's conclusions on issues of law. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382-83 (2010).

[Manhattan Trailer Park Homeowners Ass'n v. Manhattan Trailer Court & Trailer Sales, Inc., 438 N.J. Super. 185, 193 (App. Div. 2014).]

"The very object of the summary judgment procedure . . . is to separate real issues from issues about which there is no serious dispute." Shelcusky v. Garjulio, 172 N.J. 185, 200-01 (2002). A motion for summary judgment will not be precluded by bare conclusions lacking factual support, Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011), self-serving statements, Heyert v. Taddese, 431 N.J. Super. 388, 413-14 (App. Div. 2013), or disputed facts "of an insubstantial nature." Pressler & Verniero, Current N.J. Court Rules, comment 2.1 on R. 4:46-2 (2015). "[W]hen the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." Brill, supra, 142 N.J. at 540 (citation and internal quotation marks omitted).

On appeal, plaintiffs reassert the legal arguments they advanced on reconsideration, suggesting the motion judge erroneously limited his examination to agency principles, and ignored other tests distinguishing independent contractors from employees, as found in workers' compensation jurisprudence and § 220 of the Restatement (Second) of Agency. Plaintiffs argue record evidence supports Goodall was an employee of Rite Aid or Same Day for the purposes of determining liability for negligent hiring. We are not persuaded.

Whether a party is an employee for purposes of determining his or her right to workers compensation requires the statutory interpretation of the defined term "employee," which has been extended "beyond the common-law concept" to "distinguish[] servants from independent contractors." Tofani v. LoBiondo Bros. Motor Express, Inc., 83 N.J. Super. 480, 485 (App. Div.), aff'd, 43 N.J. 494 (1964). The cases cited by plaintiffs in this specialized area of the law are inapposite to our review.

Next, plaintiffs' argument that Goodall's courier services were an integral part of defendants' respective businesses is not based on evidence in this record; rather, it represents an assumption. There is no evidence describing the business impact or even the number of daily prescription deliveries.

Notably, plaintiffs ignore the contract executed between Goodall and SCI, defining the business relationship. The agreement disclaimed the creation or existence of an employer-employee relationship, which alone is not definitive. See Mavrikidis v. Petullo, 153 N.J. 117, 133 (1998) ("The important difference between an employee and an independent contractor is that one who hires an independent contractor has no right of control over the manner in which the work is to be done, it is to be regarded as the contractor's own enterprise, and he, rather than the employer is the proper party to be charged with the responsibility for preventing the risk, and administering

and distributing it." (citation and internal quotation marks omitted)).

However, the agreement terms place responsibility for the cost of necessary equipment for performance solely on Goodall. The motion judge observed Goodall's vehicle contained no identifying logos of defendants. SCI paid Goodall and submitted any required tax reporting. Finally, Goodall controlled whether he delivered (dependent on SCI's payment negotiations), when he delivered, as well as the mode and manner of delivery. Rite Aid's interaction was limited solely to providing the product and its destination for delivery.

We conclude plaintiffs' allegations regarding Goodall's status simply do not support an employee-employer relationship with Rite Aid or Same Day. Neither defendant maintained a right nor actually acted to exert control over the delivery services. See Bahrle v. Exxon Corp., 145 N.J. 144, 157 (1996) (defining an independent contractor as "a person who, in carrying on an independent business, contracts to do a piece of work according to his own methods without being subject to the control of the employer as to the means by which the result is to be accomplished[,] but only as to the result of the work") (citation and internal quotation marks omitted).

Plaintiffs' claims of agency under the Restatement fail for similar reasons. See Carter v. Reynolds, 175 N.J. 402, 409-10

(2003) (quoting Restatement (Second) of Agency § 220(2) (1958)). The Restatement is based on the principles of respondeat superior, wherein "an employer can be found liable for the negligence of an employee causing injuries to third parties, if, at the time of the occurrence, the employee was acting within the scope of his or her employment." Id. at 408-09. "To establish a master's liability for the acts of his servant, a plaintiff must prove (1) that a master-servant relationship existed and (2) that the tortious act of the servant occurred within the scope of that employment." Id. at 409. Assuming for the sake of argument Goodall could be characterized as an employee of Rite Aid or Same Day, nothing in the record suggests his actions toward Glenn were in any way authorized by either defendant or contemplated within the scope of his employment as a courier.

Plaintiffs next contend Goodall's previous charges for drug and weapons offenses made him "unfit for the job of delivering medication." They maintain the evidence shows Rite Aid and Same Day negligently engaged him to perform those services when they "knew or should have known" he was unfit and dangerous. This argument reflects the principle that an employer who negligently hires or retains an employee "who is incompetent or unfit for the job, may be liable to a third party whose injury was proximately caused by the employer's negligence." Di Cosala v.

Kay, 91 N.J. 159, 170 (1982). Plaintiffs alternatively suggest liability exists for the negligent hire of an incompetent independent contractor. See Mavrikidis, supra, 153 N.J. at 136 (1998).

For the reasons previously expressed, we reject the suggestion liability exists against Rite Aid and Same Day for negligently hiring "an incompetent, unfit or dangerous employee." Di Cosala, supra, 91 N.J. at 166-67. The proofs do not show Goodall was an employee: neither Rite Aid nor Same Day exercised control over Goodall's operations, paid him, or directed him when performing deliveries, which were not shown to be an integral or regular part of Rite Aid's business. Thus, a claim for negligent hiring must be rejected as unfounded.

Plaintiffs' alternative theory of liability, arguing defendants hired an incompetent independent contractor, is equally unavailing. "Ordinarily, an employer that hires an independent contractor is not liable for the negligent acts of the contractor in the performance of the contract." Bahrle, supra, 145 N.J. at 156. Similarly, a "principal is not vicariously liable for the torts of the independent contractor if the principal did not direct or participate in them." Baldassarre v. Butler, 132 N.J. 278, 291 (1993). To hold an employer liable for the torts of an independent contractor, claimants must establish "(1) that the contractor was

incompetent or unskilled to perform the job for which he was hired, and (2) that the principal knew or had reason to know of the contractor's incompetence." Mavrikidis, supra, 153 N.J. at 137.

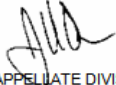
Here, no evidence supports application of these principles. Plaintiffs base their argument on the prior gun charge, which admittedly, had it been discovered, should have disqualified Goodall from performing deliveries for a pharmacy. However, the evidentiary record does not demonstrate Same Day was negligent in this regard, as the "[l]iability of an employer is not to be predicated solely upon failure to investigate the criminal history of an applicant." Lingar v. Live-In Companions, Inc., 300 N.J. Super. 22, 32 (App. Div. 1997). Rather, "[t]he totality of the circumstances surround the hiring must be considered in determining whether the employer exercised due care." Ibid.

Despite the passage of time, the process of obtaining accurate criminal history remains difficult. Same Day personnel testified they performed a check both before and after the incident, but did not discover the gun charge. Plaintiffs themselves did not produce Goodall's plea agreement until after summary judgment, more than five years following the filing of their complaint. When determining a party's potential liability for negligence, "[f]oresight, not hindsight, is the standard by

which one's duty of care is to be judged." Hill v. Yaskin, 75
N.J. 139, 144 (1977). Summary judgment was properly granted.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION