



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JESUS COLON,)
) No. 180, 2013
 Plaintiff Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for New Castle County
)
 GANNETT COMPANY, INC.,)
 a Delaware Corporation)
 t/a THE NEWS JOURNAL,) C.A. No. N10C-04-007
)
 Defendant/Third-Party)
 Plaintiff Below,)
 Appellee.)

Submitted: September 18, 2013
Decided: October 28, 2013

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

ORDER

This 28th day of October 2013, upon consideration of the parties' briefs and the record below, it appears to the Court that:

1. Appellant, Jesus Colon, appeals from a Superior Court grant of summary judgment in favor of appellee, Gannett Company, Inc.

2. On April 8, 2008, Colon was working as a street hawker¹ selling *The News Journal* at the intersection of Fourth and Jackson Streets in Wilmington, Delaware, when an automobile struck him. Colon sustained serious injuries

¹ "Street hawkers" are individuals who sell newspapers directly to readers in public locations.

resulting from the collision. At the time of the accident, Colon was working as an independent contractor for Third-Party Defendant Keith Walker, a hawker captain. Under the terms of an independent contractor agreement between Walker and Gannett, Walker sold and distributed newspapers in the Bear/New Castle area. That independent contractor agreement requires only that Walker comply with “all requirements of law in connection with operating [his] business” and grants Walker sole control and discretion over the means, method, and manner of the sale of the newspapers by the street hawkers. The agreement also does not state a specific location for the sale of the newspapers by the street hawkers. Thus, Colon was an independent contractor of Walker and a subcontractor of Gannett.

3. Colon filed a complaint against Gannett in the Superior Court alleging negligence and reckless disregard for his safety. The Superior Court initially denied Gannett’s Motion for Summary Judgment, but granted a Second Motion for Summary Judgment. Colon now appeals the Superior Court’s grant of Gannett’s Second Motion for Summary Judgment.

4. On appeal, Colon contends that the Superior Court erred by granting summary judgment to Gannett for three reasons: (1) the illegal conduct exception recognized in other states applies to the independent-contractor defense, (2) street hawking does not fall within the inherently dangerous activity exception, and (3) Delaware public policy prohibits Gannett from asserting an independent contractor

defense. For the following reasons, we find that Colon's arguments lack merit and affirm the judgment of the Superior Court.

5. Colon first contends that the illegal conduct exception is applicable to this case. Generally, we consult the *Restatement (Second) of Torts* to determine whether one party owes another party a duty of care.² Though § 409 of the *Restatement* suggests that the employer of an independent contractor is not liable for harms caused by the acts or omissions of the independent contractor, several states recognize an illegal conduct exception to that general rule.³ That exception imposes liability on the employer of an independent contractor where “the employer causes or knows of and sanctions illegal conduct.”⁴ Colon points to 21 *Del. C.* § 4147(a) which provides that “[n]o person shall stand in a highway for the purpose of soliciting any employment, business, or contributions from the occupant of any vehicle.”⁵ He argues that Gannett knew that street hawkers sold

² *Riedel v. ICI Americas, Inc.*, 968 A.2d 17, 20 (Del. 2009).

³ See, e.g., *Hickle v. Whitney Farms, Inc.*, 29 P.3d 50, 53 (Wash. App. 2001) *aff'd and remanded*, 64 P.3d 1244 (Wash. 2003) (holding that an “employer of an independent contractor is not insulated from liability if . . . the employer causes or knows of and sanctions illegal conduct”); *Shaffer v. Acme Limestone Co., Inc.*, 524 S.E.2d 688, 701 (W. Va. 1999) (holding that “the independent contractor defense is unavailable to a party employing an independent contractor when the party . . . knows of and sanctions the illegal conduct or activity by the independent contractor”).

⁴ *Hickle*, 29 P.3d at 53.

⁵ 21 *Del. C.* § 4147(a).

papers in the street and intersections in violation of § 4147(a), and therefore Gannett should be liable for Colon's injuries under the illegal conduct exception.

6. Even if an illegal conduct exception exists in Delaware, the exception is inapplicable here. There is no evidence indicating that Gannett caused Colon or other street hawkers to sell newspapers in the street. Although Gannett may have known that street hawkers were entering the street and intersections, Gannett never sanctioned such conduct. To the contrary, the record indicates that Gannett representatives had alerted hawker captains, who determined the placement of the street hawkers, to discontinue selling in street locations when they would see a hawker in the median. Furthermore, the agreement between Gannett and Walker expressly provided that Walker is required to comply with all applicable laws. Because Gannett's conduct cannot reasonably be described as causing or sanctioning the practice of selling newspapers in traffic, the illegal conduct exception to § 409 is inapplicable.

7. Colon's second argument contends that the inherently dangerous activity exception does not apply to street hawkers. This argument is not disputed by Gannett. "Delaware law requires that a justiciable controversy exist before a court can adjudicate properly a dispute brought before it."⁶ Because there is no

⁶ *Crescent/Mach I Partners, L.P. v. Dr. Pepper Bottling. Co. of Tex.*, 962 A.2d 205, 208 (Del. 2008) (quoting *Warren v. Moore*, 1994 WL 37433 at *2 (Del. Ch. July 6, 11994)).

controversy to this claim, and because a resolution of the claim in favor of Colon is not dispositive, the claim is moot.

8. Finally, Colon argues that public policy should preclude Gannett from asserting an independent-contractor defense. Colon argues that a principal, with knowledge of tortious or illegal conduct on the part of the subcontractor, should not be insulated from liability. This essentially rehashes Colon's initial argument, but only requires that Gannett have knowledge of the independent contractor's illegal conduct. Colon explains that Gannett should not be allowed to profit off the street hawkers, while at the same time turning a blind eye to their illegal selling activity. In support of this argument, Colon points to a Supreme Court of Iowa Case, *Hough v. Central States Freight Service, Inc.*⁷ *Hough* involves an automotive collision with an independent contractor of a trucking firm.⁸ The trucking firm deliberately subcontracted unlicensed drivers in order to avoid purchasing permits.⁹ The Supreme Court of Iowa determined that the firm was liable because it knew the drivers were unlicensed could not "shield [themselves] behind the rules as to an independent contractor."¹⁰

⁷ 269 N.W. 1 (Iowa 1936).

⁸ *Id.* at 2-3.

⁹ *Id.* at 5.

¹⁰ *Id.*

9. *Hough* is inapposite. In *Hough*, the firm actively hired unlicensed independent contractors in order to avoid purchasing permits. The firm not only had knowledge of the illegal activity, they specifically hired to perpetrate the illegal activity. Here, there is no evidence that Gannett hired Walker specifically to sell newspapers in the street to act as a shield for liability. Gannett only hired Walker to provide street hawkers to sell the newspaper, not to directly engage in any illegal activity. Thus, Colon's final argument on appeal fails.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice