CITATION: Chieffallo v. Ghuman o/a Appleseed Snowblowing Service, 2017 ONSC 1569
DIVISIONAL COURT FILE NO.: DC-13-1954
DATE: 2017/03/08

2017 ONSC 1569 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Mr. Justice Calum MacLeod

BETWEEN:	)	
Yvonne Chieffallo	)	Francis Aheto-Tsegah, for the Appellant
Appellant	)	
– and –	)	
Jag Ghuman o/a Appleseed Snowblowing Service	)	Tessa Warmelink, for the Respondent
Respondent	)	
	)	**HEARD:** March 1, 2017

REASONS FOR JUDGMENT

[1] This is an appeal from the decision of Deputy Judge Bansie rendered on July 26, 2013 in Small Claims Court. After a two day trial, the deputy judge dismissed the plaintiff's claim against the defendant she had sued and awarded costs against her.

[2] Mr. Aheto-Tsegah must be commended for the manner in which he argued the appeal. He was not counsel at trial and he did not draft the pleadings or the notice of appeal. In fact he was brought in to argue the matter because Mr. Allan, who is the lawyer of record was not available. Despite his best efforts, however, I am persuaded by Ms. Warmelink that there was no error of law and the findings of fact of the deputy judge are findings that were open to him on the totality of the evidence. Accordingly, the appeal must be dismissed. This requires brief reasons.

Background

[3] By way of background, the defendant Mr. Ghuman, operates a local franchise of Appleseed Snowblowing Service and is the owner of a number of farm tractors equipped with snow removal equipment. He does so through an unincorporated sole proprietorship and consequently he is named as defendant in his personal capacity.

[4] On February 10th, 2010 there was an altercation between the plaintiff Ms. Chieffallo and one of the defendant's machinery operators. It is undisputed that the driver, whose name was Nicholas Vaughn, assaulted the plaintiff by intentionally directing the snow and slush discharge from the snowblower towards her and he also used a highly offensive racial epithet. The plaintiff suffered personal injury, indignity and humiliation. Undeniably this act of aggression was an intentional tort for which the plaintiff would have been entitled to an award of damages.

[5] The plaintiff retained counsel and she sued the defendant in Small Claims Court. It is important to emphasize that she did not sue the tortfeasor who committed the assault nor did she allege any wrongful act or omission on behalf of the defendant himself. The only question before the Small Claims Court was whether or not the defendant (Mr. Ghuman) was vicariously liable for the intentional and deplorable actions of the driver (Mr. Vaughn).

[6] The evidence established that the defendant treated all of his drivers as independent contractors and not employees. After a two day trial the court concluded firstly, that Mr. Vaughn was a contractor and secondly, that in assaulting the plaintiff his actions were unauthorized and outside the scope of his contract. He found that the tortfeasor's "deplorable actions" were in no way "connected to the work for which he was contracted" and accordingly that "liability does not flow to this defendant." In light of this finding, he dismissed the action and did not assess the plaintiff's damages.

[7] The plaintiff appeals. She argues that the finding that there was no employer-employee relationship was an error of law, that the finding there was no vicarious liability was an error of law and also that the judgment was "against the weight of the evidence".

Standard of Review

[8] Trial courts are entitled to deference. An appeal is not an opportunity to try to persuade a different judge to reach a different decision. An appellate court may only intervene if the decision being appealed from is incorrect. "Incorrect" means that in relation to findings of fact, the evidence before the court cannot support the findings made by the judge below. This has been described as requiring "palpable and overriding error" or in simplest terms, an obvious mistake.

[9] When it comes to questions of law, the trial judge will be held to a standard of correctness. That is to say that if the trial judge misstates or misinterprets the law or applies incorrect legal principles, the appeal court may correct those errors. In either case, the question is not whether the judge sitting in appeal agrees with the trial judge but only whether the judge

2017 ONSC 1569 (CanLII)

has made an error that requires the appellate court to grant relief. The leading case is the Supreme Court of Canada decision in *Housen v. Nikolaisen.*[1]

Analysis

[10] The deputy judge's conclusion that the tortfeasor stood in an independent contractor relationship with the defendant is a finding of fact that was open to him on the evidence. Amongst other things, the defendant testified that all of his drivers operated as contractors, there was a standard form contract establishing that relationship and the drivers invoiced for their services. They were not paid as employees. While it is true that parties that are contractors for tax purposes may be regarded as employees for other purposes, it cannot be said that the evidence did not support the conclusion reached by the deputy judge.

[11] Classification as an employee or a contractor is not the end of the inquiry in respect of vicarious liability. It is more likely that vicarious liability will be imposed on an employer for torts committed by employees than for torts committed by independent contractors but in neither case is the conclusion automatic. In the case of intentional torts, the court may find that they are outside the scope of employment even if they are committed by an employee while performing employment duties. In the case of a contractor, there are circumstances in which vicarious liability has been imposed despite the fact that the employer does not control contractors to the same degree as employees.

[12] The deputy judge correctly identified the governing Supreme Court of Canada authorities as *671122 Ontario Limited v. Sagaz Industries Canada Inc.*[2] and *Bazley v. Curry.*[3]

[13] *Sagaz* stands for the proposition that vicarious liability is a form of strict liability which is relatively limited in its operation. The Supreme Court held that vicarious liability for the acts of an employee will attach where the employee is acting in the course of employment. Vicarious liability is less likely to be imposed for the acts of a contractor but may be imposed if the tortious act is within the scope of work controlled by the business owner although control is not the only test. Vicarious liability is imposed based on twin policy considerations of ensuring a just and practical remedy for plaintiffs injured by a business and of deterring future harm. Vicarious liability is justified because the risks of being in business should be borne by the business.[4] Importantly, the court states that no one test is conclusive to differentiate between employees and contractors, no exhaustive set of factors can be enunciated and there is no set formula as to their application. The determination will "depend on the particular facts and circumstances of the case".[5]

[14] Accordingly while there are legal principles to be applied, the determination as to whether a defendant is an employee or a contractor is a finding of fact or of mixed fact and law.

---

[1] 2002 SCC 33, [2002] 2 SCR 235
[2] 2001 SCC 59, [2001] 2 SCR 983
[3] [1999] 2 SCR 534
[4] *Sagaz* @ para. 33
[5] Ibid, @ para. 48

2017 ONSC 1569 (CanLII)

The finding made by the deputy judge is entitled to deference. On the evidence, the finding that the driver was a contractor and not an employee is supportable. It is a finding that was open to the deputy judge on the evidence. In *Sagaz* the Supreme Court noted that while the defendant controlled what was done under the contract, the contractor controlled how it was done and the court also remarked that the contractor had no authority to negotiate on behalf of *Sagaz* or to bind it to any agreement. The trial judge's findings that Landow and AIM were contractors and *Sagaz* was not vicariously liable were upheld and the decision of the Court of Appeal to impose vicarious liability was overturned.

[15] *Bazley* was an appeal of a decision on a stated case. The issue was whether an employer could be held liable for an intentional tort which in *Bazley* was sexual abuse of children in the care of the defendant. The Supreme Court set out a framework for deciding whether or not to impose vicarious liability for intentional torts which was more robust than the traditional test of whether or not the tort was committed within the "scope of employment". While upholding the traditional *Salmond* test, the court restated it in clear language. The fundamental question is whether the wrongful act is sufficiently related to authorized conduct to justify the imposition of vicarious liability. If the employer's business creates or enhances a risk and the wrong flows from that enhanced risk then vicarious liability may be appropriate. Thus where the employer had the care of children and the employee's duties included tucking vulnerable children into bed at night, abuse of that trust justified imposition of vicarious liability.

[16] In the case at bar, the deputy judge concluded that clearing snow from driveways did not create or enhance the risk of assault. Moreover he accepted the evidence that the driver was not supposed to interact with customers and customers were told not to interact with the drivers. Any complaints or questions were to be directed to the head office. Again, this is a finding of fact and it does not appear the deputy judge ignored the law or the applicable legal principles.

[17] Counsel for the appellant argues that the reasons of the deputy judge simply cite *Sagaz* and *Bazley* but do not include any evidence that he actually engaged in the type of policy considerations required by those cases. I agree that simply citing authorities without actually applying the legal test set out in those authorities would be an error of law that might convert an error of fact to an error of law. Provided the trier of fact has considered all of the evidence and applied the correct legal test, the findings are entitled to a high standard of deference and will be reviewed on the standard of palpable and overriding error.[6]

[18] In a busy high volume court such as Small Claims Court in which deputy judges are expected to act efficiently and generally give oral judgments, it is not expected that the reasons for judgment articulate the judge's entire thought process. In any court, it is sufficient if the reasons are responsive to the live issues and the parties' key arguments. Reasons must be sufficient to demonstrate why the decision was arrived at when read in the context of the evidence and arguments before the court. Reasons are not inadequate simply because with the

[6] See *Housen v. Nikolaisen, supra* @ para. 27 & 28

2017 ONSC 1569 (CanLII)

benefit of hindsight the judge might have done a better job of expressing himself and in any event the adequacy of reasons is not in itself a free standing basis for appeal.[7]

2017 ONSC 1569 (CanLII)

Conclusion

[19] In conclusion, the plaintiff suffered a reprehensible and racist attack for which she would have been entitled to compensation by the perpetrator. This was never in issue. The determination by the deputy judge that the only defendant sued by the plaintiff was not vicariously liable is supported by his findings of fact. He concluded that the tortfeasor was an independent contractor and he concluded that the intentional acts of the perpetrator were independent of his duties under the contract. Read in the context of the evidence before him and the arguments made by counsel, his reasons demonstrate that he applied the correct legal tests. His conclusions are therefore findings of fact or mixed fact and law. It cannot be said that they are unsupported by the evidence or that the deputy judge made a palpable and overriding error.

[20] The appeal is therefore dismissed. The defendant is entitled to costs on a partial indemnity scale. I may be spoken to if counsel cannot agree on the amount.

Mr. Justice C. MacLeod

Released: March 8, 2017

[7] *F.H. v. McDougall*, 2008 SCC 53, [2008] SCR 41

CITATION: Chieffallo v. Ghuman o/a Appleseed Snowblowing Service, 2017 ONSC 1569

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:

Yvonne Chieffallo

Appellant

– and –

Jag Ghuman o/a Appleseed Snowblowing Service

Respondent

REASONS FOR JUDGMENT

C. MacLeod J.

Released: March 8, 2017

2017 ONSC 1569 (CanLII)