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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1650**

John Doe 101, et al.,
Appellants,

vs.

Matthew Feeney, et al.,
Defendants,

Walden Entertainment a/k/a Samaritan Casting, LLC,
Respondent,

Werc Werk Works,
Respondent,

Allensworth Entertainment, Inc.,
Respondent,

White Wolf Entertainment, Inc.,
Respondent.

**Filed April 10, 2017
Affirmed
Larkin, Judge**

Hennepin County District Court
File No. 27-CV-14-17039

Michael A. Bryant, Bradshaw & Bryant, PLLC, Waite Park, Minnesota; and

Patrick W. Noaker, Noaker Law Firm, LLC, Minneapolis, Minnesota (for appellants)

James A. Garlough, Garlough Law Firm, PLLC, Bloomington, Minnesota (for respondent
Samaritan Casting)

Michael S. Kreidler, Stich, Angell, Kreidler, Dodge & Unke, P.A., Minneapolis, Minnesota (for respondent Werc Werk Works)

John C. James, John M. James, Minnetonka, Minnesota; and

John D. Hagen, Jr., Minneapolis, Minnesota (for respondent Allensworth Entertainment)

Robert S. Halagan, Halagan Law Firm, Ltd., Buffalo, Minnesota; and

John P. Borger, Faegre Baker Daniels LLP, Minneapolis, Minnesota (for respondent White Wolf Entertainment, Inc.)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellants challenge the district court's summary-judgment dismissal of their negligence-based claims against respondents, which stemmed from an extras casting director's sexual abuse of appellants at his home. We affirm.

FACTS

In 2006, Matthew Feeney created Walden Entertainment LLC (Walden). Walden cast extras for local film productions. Feeney was its sole owner and employee. At that time, Walden was the only extras casting company in Minnesota. Feeney worked with hundreds of different producers in extras casting, and none had the ability to prevent Feeney from casting extras for other producers. Some of the extras casting agreements

between Feeney and the production companies were memorialized in written contracts, others simply involved a “verbal agreement and a handshake.”

Feeney met appellants John Doe 101 and John Doe 102 in 2007 or 2008. Appellants were minor children who aspired to be actors. Feeney provided appellants with casting opportunities, acting classes, and coaching. Between 2009 and 2011, appellants went to Feeney’s home numerous times for acting classes and coaching, and to play games and watch movies. Appellants often spent the night at Feeney’s home. Appellants also went on outings with Feeney and other children, including camping trips. Appellants’ parents consented to these contacts with Feeney. Unbeknownst to appellants’ parents, Feeney had pleaded guilty to fourth- and fifth-degree criminal sexual conduct in 1992.

Between May 2009 and the summer of 2011, Feeney sexually abused John Doe 101 multiple times. Between December 2009 and November 2011, Feeney sexually abused John Doe 102 multiple times. In March 2013, Feeney pleaded guilty to second- and fourth-degree criminal sexual conduct based on his abuse of appellants.

In January and February 2014, appellants sued Feeney and respondents Samaritan Casting LLC (Samaritan), Werc Werk Works (WWW), and Allensworth Entertainment Inc. (AEI), alleging sexual abuse and negligence claims against Feeney; negligence claims against Samaritan, WWW, and AEI; and negligent-supervision, negligent-retention, and vicarious-liability claims against Samaritan and WWW. In October 2015, appellants amended their complaint to add respondent White Wolf Entertainment Inc. (White Wolf) as a defendant, alleging negligence, negligent-supervision, negligent-retention, and vicarious-liability claims.

The district court granted summary judgment for each of the respondents. In July 2016, appellants' remaining claims against Fenney were tried to a jury. Because the district court had granted appellants' motion for partial summary judgment against Feeney on the issue of liability, the trial was limited to the issue of damages. The jury awarded John Doe 101 and John Doe 102 damages of \$974,281.05 and \$1,098,796.93, respectively. The district court adopted the jury's verdicts and entered judgments against Feeney. Appellants challenge the district court's pretrial grant of summary judgment for respondents.

D E C I S I O N

“A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). No genuine issue of material fact exists “when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). If reasonable minds might draw different conclusions from the evidence presented, summary judgment is inappropriate. *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 665 (Minn. 2015).

This court reviews a district court’s grant of summary judgment de novo. *Dukowitz v. Hannon Sec. Servs.*, 841 N.W.2d 147, 150 (Minn. 2014). “We view the evidence in the light most favorable to the party against whom summary judgment was granted to

determine whether there are any genuine issues of material fact and whether the district court correctly applied the law.” *Id.* We consider the district court’s summary-judgment dismissal of appellants’ claims against each respondent in turn.

I.

Stephanie Allensworth met Feeney around 2002. In 2008, Allensworth was an agent and part owner of NXT Entertainment Inc. (NXT), a talent agency. In March 2008, appellants’ mother signed agency-talent contracts on behalf of appellants with NXT. The contracts authorized NXT to “negotiate contracts” and “advise, counsel or direct” appellants in “the development and/or advancement of [their] professional career[s].” After signing the contracts, appellants and appellants’ mother believed that Allensworth was appellants’ agent. According to appellants’ mother, in 2008, Allensworth advised appellants to meet with Feeney in an effort to obtain roles as extras in movie and television projects.¹ Allensworth explained that these extra, nonspeaking roles would help appellants obtain speaking roles. NXT never secured employment for either appellant.

In December 2008, NXT ceased operations, and Allensworth formed AEI. Allensworth is the sole employee of AEI. AEI did not have a written agreement with appellants. AEI sent appellants on auditions and forwarded videotaped auditions to

¹ The parties disagree regarding whether Allensworth referred appellants to Feeney. Allensworth submitted an affidavit in support of summary judgment stating that she did not “recall referring Plaintiffs John Doe 101 or John Doe 102 or any of their other family members to Defendant Feeney or Walden Entertainment.” According to Allensworth, Feeney referred appellants to NXT. For purposes of our summary-judgment analysis, we assume Allensworth made the referral.

entertainment companies on appellants' behalves. The auditions and videotapes did not result in further auditions or employment for appellants.

Appellants contend that the district court erred in granting AEI summary judgment on their negligence claims. "To recover on a claim of negligence, a plaintiff must prove: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) that the breach of the duty was a proximate cause of the injury." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014). A person generally "does not owe a duty of care to another—e.g., to aid, protect, or warn that person—if the harm is caused by a third party's conduct." *Id.* at 177-78. This is true even when the person "realizes or should realize that action on her part is necessary for another's aid or protection." *Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007) (quotation omitted). However, a person does have a duty to protect another from harm caused by a third party if "(1) there is a special relationship between the parties; and (2) the risk is foreseeable." *Id.* The existence of a duty of care is a question of law that this court reviews de novo. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011).

The supreme court has identified three situations in which a special relationship exists such that a person may have a duty to protect another from a third party. *Bjerke*, 742 N.W.2d at 665.

The first arises from the status of the parties, such as parents and children, masters and servants, possessors of land and licensees, and common carriers and their customers. The second arises when an individual, whether voluntarily or as required by law, has custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection. The third arises when an individual assumes responsibility for a duty that is owed by another individual to a third party.

Id. (citations and quotations omitted). For example, a person has a duty to act when the person “undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things.” *Walsh v. Pagra Air Taxi, Inc.*, 282 N.W.2d 567, 571 (Minn. 1979) (quoting Restatement (Second) of Torts § 324A (1965)).

Appellants contend that the third special-relationship scenario is present here. Appellants argue that “Allensworth agreed to perform services that Allensworth should have recognized included the protection of Doe 101 & 102,” that “[t]he written contract provided that Allensworth would negotiate contracts on the Appellants’ behalf and advise, counsel and direct [appellants] in the development and advancement of their professional acting careers,” that “[t]hese services necessarily include an agreement to not place [appellants] in danger,” and that “[w]hen Allensworth agreed to represent [appellants], it was her job to screen persons to whom she sent these children.” Appellants therefore conclude that there “was a special relationship between Allensworth and [appellants] giving rise to a duty to protect” appellants from Feeney.

Appellants do not cite any caselaw or other authority establishing that a child actor’s agent undertakes to render services that she should recognize are necessary for the protection of the child. When this court pressed appellants for legal authority supporting their position at oral argument, appellants conceded that there is no authority on point. Moreover, the record in this case in no way suggests that Allensworth undertook to render services to appellants that she should have recognized were necessary for their protection.

In sum, neither the law nor the record supports appellants' contention that Allensworth had a special relationship with them that gave rise to a duty to protect them from Feeney's abuse. The district court therefore did not err by granting summary judgment for AEI.

II.

Feeney arranged for John Doe 102 to work as an extra for one day in an episode of "Monster Quest," a television program. White Wolf produced that episode.² Appellants' father accompanied John Doe 102 during filming of the episode on September 29, 2009. Feeney was not present for the filming.

John Doe 102 contends that the district court erred in granting summary judgment for White Wolf on his negligence, negligent-supervision, negligent-retention, and vicarious-liability claims. John Doe 102 argues that there is a material factual dispute regarding whether Feeney was White Wolf's employee or agent. John Doe 102 further argues that there was a special relationship between White Wolf and John Doe 102 "through employee/agent Matthew Feeney" giving rise to a "duty of care to protect children from harm who were involved with the production of ['Monster Quest']."

Under the common-law doctrine of respondeat superior, an employer may be held vicariously liable for the torts of an employee committed within the course and scope of

² The parties disagree regarding whether White Wolf produced the episode. Doug Hajicek, the president and owner of White Wolf, submitted an affidavit in support of summary judgment stating that "White Wolf contracted with Ilexfilmworks, Inc. ('Iflex') to act as the producer for a re-enactment sequence" and "Ilex subsequently contracted with [Walden] to obtain extras." For the purpose of our summary-judgment analysis, we assume that White Wolf produced the "Monster Quest" episode.

employment. *Urban v. Am. Legion Dep't of Minn.*, 723 N.W.2d 1, 4 (Minn. 2006). Negligent-supervision and negligent-retention claims require the existence of an employment relationship. See *L.M. ex rel. S.M. v. Karlson*, 646 N.W.2d 537, 545 (Minn. App. 2002) (stating that negligent supervision requires that the employee's actions occurred within the scope of employment), *review denied* (Minn. Aug. 20, 2002); *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 422 (Minn. App. 1993) (noting that negligent retention imposes liability for an employee's intentional tort), *review denied* (Minn. Apr. 20, 1993). An employer is not vicariously liable for an independent contractor's negligence. *Conover v. N. States Power Co.*, 313 N.W.2d 397, 403 (Minn. 1981).

In determining whether an employment relationship exists, this court considers: “(1) the right of the employer to control the manner and means of performance of the work; (2) the mode of payment; (3) furnishing of material or tools; (4) control of the premises where the work is to be performed; and (5) right of discharge.” *Iverson v. Indep. Sch. Dist. No. 547*, 257 N.W.2d 572, 573 (Minn. 1977). The most important factor is “the right of the employer to control the means and manner of performance.” *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (1964). “The determinative right of control is not merely over *what* is to be done, but primarily over *how* it is to be done.” *Frankle v. Twedt*, 234 Minn. 42, 47, 47 N.W.2d 482, 487 (1951). “Where the evidence is free from conflict as to the controlling facts, the question of whether a person is an employee becomes one of law.” *Darvell v. Paul A. Laurence Co.*, 239 Minn. 55, 59, 57 N.W.2d 831, 834 (1953).

There is a similar long-standing common law rule that “a principal is liable for the act of an agent committed in the course and within the scope of agency.” *Bedow v. Watkins*, 552 N.W.2d 543, 547 (Minn. 1996). “A principal-agent relationship results from the manifestation of consent by one person to another that the other shall act on the first person’s behalf and subject to his control; and the other must consent so to act.” *White v. Boucher*, 322 N.W.2d 560, 566 (Minn. 1982). “The existence of an agency relationship is a question of fact, and should be decided by the jury unless the evidence is conclusive.” *Urban ex rel. Urban v. Am. Legion Post 184*, 695 N.W.2d 153, 164 (Minn. App. 2005) (citation omitted), *aff’d sub nom. Urban v. Am. Legion Dep’t of Minn.*, 723 N.W.2d at 1.

In sum, the threshold question regarding John Doe 102’s negligent-supervision, negligent-retention, and vicarious-liability claims against White Wolf is whether Feeney was an employee or agent of White Wolf.

The record indicates that Feeney and Walden provided extras to White Wolf for multiple “Monster Quest” episodes. White Wolf paid Walden for Feeney’s recruitment of extras for “Monster Quest” on an episode-by-episode basis. White Wolf did not provide Feeney with any direction regarding how to cast the extras, and Feeney did not provide White Wolf with any written or oral reports regarding his casting efforts. While working with White Wolf, Feeney also worked with other production companies on other projects.

Our independent review of the record does not reveal a material factual dispute regarding whether Feeney was an employee or agent of White Wolf. Feeney denied such a relationship in his deposition testimony, and Feeney did not have an employment agreement with White Wolf. White Wolf did not pay Feeney a salary. White Wolf did not

control the means or manner of Feeney's performance or the premises where Feeney's work was performed. And White Wolf did not provide Feeney with material or tools. There is no evidence from which a reasonable mind could conclude that Feeney was employed by, or an agent of, White Wolf. Instead, the only reasonable conclusion that can be drawn from the record is that Feeney was an independent contractor who supplied extras for a number of different production companies, including White Wolf. The district court therefore did not err in granting summary judgment for White Wolf on John Doe 102's negligent-supervision, negligent-retention, and vicarious-liability claims.

Our de novo review of the record also does not reveal evidence of a special relationship between White Wolf and John Doe 102 that could have given rise to a duty to protect John Doe 102 from abuse in Feeney's home. John Doe 102 was not acting as an extra when the abuse occurred, and the abuse did not occur on the "Monster Quest" set. The evidence does not suggest that White Wolf ever had custody of John Doe 102 or assumed responsibility for John Doe 102's protection during filming. To the contrary, industry practice required an adult guardian of any minor extra to be present on the set. In fact, John Doe 102's father was present during filming.

In sum, John Doe 102 has not demonstrated, and the record does not reveal, how the limited relationship between White Wolf and John Doe 102 was a special relationship that gave rise to a duty to protect him from Feeney's abuse. The district court therefore did not err in granting White Wolf summary judgment on John Doe 102's negligence claim.

III.

In 2010, Feeney told appellants' father that he was employed by the production company for the movie "The Convincer." "The Convincer" was later renamed "Thin Ice." WWW was the production company for "Thin Ice."³ Feeney was the extras-casting director for the film and provided "background artists for the set for the length of the shooting of the movie." Feeney told appellants' father that he could cast appellants as extras in the film and advised appellants' father that appellants would benefit from "coaching sessions" at his home.

"Thin Ice" was filmed in Minnesota between February 2010 and March 2010. John Does 101 and 102 appeared as extras in the film. There were no auditions or casting calls for these parts. John Doe 101 was accompanied by his mother, father, and minor sister when he worked as an extra during filming on February 11, and by an adult brother and adult sister during filming on March 1. John Doe 102 was accompanied by his adult brother when he worked as an extra during filming on February 9. Feeney also appeared as an extra in the film, but he did not supervise appellants on set.

Appellants contend that the district court erred in granting summary judgment for WWW on their negligence-based claims. Appellants argue that there is a material factual dispute regarding whether Feeney was WWW's employee or agent. Appellants rely on

³ The parties disagree regarding whether WWW produced "Thin Ice." Mark Steele, the vice president of production for WWW, submitted an affidavit in support of summary judgment stating that "Thin Ice" was produced by Ten Dollar Trophy LLC, a separate legal entity from WWW. For the purpose of our summary-judgment analysis, we assume that WWW produced "Thin Ice."

Mark Steele's deposition, noting that he "did not know who was in charge of the casting procedures for Thin Ice, . . . did not know who Matthew Feeney reported to, . . . did not know how Feeney was paid, who actually paid Feeney or when Matthew Feeney was hired as the Extras Casting Director." Appellants further argue that there was a special relationship between WWW and appellants "through employee/agent Matthew Feeney" giving rise to a "duty of care to protect children from harm who were involved with the production of ['Thin Ice']."

Our independent review of the record does not reveal a material factual dispute regarding whether Feeney was an employee or agent of WWW. Steele's lack of knowledge regarding the details of Feeney's extras-casting agreement for "Thin Ice" would not lead a reasonable mind to conclude that Feeney was an employee or agent of WWW.⁴ The record shows that there was no agreement regarding the procedure Feeney would use to provide extras for "Thin Ice," Feeney was paid by Walden and not WWW, WWW did not control

⁴ During Feeney's deposition, Feeney asserted his Fifth Amendment right against self-incrimination when asked questions regarding his abuse of appellants, including questions regarding whether he abused appellants while he was the extras-casting director for "Thin Ice." Appellants contend that in each of these instances they "are entitled to inferences in their favor." In a civil case, a factfinder may draw an adverse inference from a party's or witness's invocation of the Fifth Amendment right against self-incrimination. *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 111 n.1 (Minn. 1992); see *In re Marriage of Crockarell*, 631 N.W.2d 829, 831 (Minn. App. 2001) (noting that the district court may take appropriate measures to ensure that assertion of the Fifth Amendment right against self-incrimination does not unfairly prejudice an adverse party), *review denied* (Minn. Oct. 16, 2001). The district court refused to draw an inference against WWW regarding Feeney's relationship with WWW, reasoning that Feeney answered all questions regarding that relationship and only invoked his right against self-incrimination when asked about his abuse of appellants. Because Feeney did not invoke the Fifth Amendment in response to any question regarding his relationship with WWW, appellants are not prejudiced by the invocation and are not entitled to a favorable inference regarding Feeney's relationship with WWW.

the means or manner of Feeney's performance, and WWW did not provide Feeney with material or tools.

The only reasonable conclusion to be drawn from the record regarding Feeney's relationship with WWW is that he was an independent contractor who supplied extras for "Thin Ice." The district court therefore did not err in granting summary judgment for WWW on appellants' negligent-supervision, negligent-retention, and vicarious-liability claims.

As to the negligence claims, the record does not suggest that WWW had a special relationship with appellants that gave rise to a duty to protect them from Feeney's abuse. There is no evidence supporting a reasonable conclusion that appellants were entrusted to WWW's care. Pursuant to industry practice, appellants were accompanied by adult guardians while they worked as extras on the set of "Thin Ice."

In sum, appellants have not demonstrated, and the record does not reveal, how WWW's limited involvement with appellants created a special relationship that could have given rise to a duty to protect them from Feeney's abuse. The district court therefore did not err in granting WWW summary judgment on appellants' negligence claims.

IV.

In February 2012, Feeney was criminally charged with child sexual abuse in Massachusetts, and Jeremy Gustafson took control of Walden. Previously, Gustafson occasionally worked for Walden on a casual, on-call basis, "assisting with casting events and auditions as well as equipment rentals and the like." After less than one week, Gustafson informed Feeney that he did not think Walden was "salvageable" and that

Gustafson could no longer be involved with the company. Feeney closed Walden and sold its assets. In March 2012, Gustafson started Samaritan. Samaritan purchased computers, office equipment, and Walden's domain name and e-mail lists from Walden. Gustafson and Feeney agreed on a \$42,000 purchase price for these assets and agreed that Feeney would receive \$1,000 and 50% of Samaritan's profits until the total purchase price was paid. Walden sold its remaining assets to other businesses. In December 2013, Gustafson sold Samaritan.

Appellants contend that Samaritan is liable for their claims against Walden because "Walden's transfer of assets to Samaritan constituted a de facto merger."⁵

"The general rule is that where one company sells or otherwise transfers all its assets to another company, the purchasing company is not liable for the debts and liabilities of the transferor." *J.F. Anderson Lumber Co. v. Myers*, 296 Minn. 33, 37, 206 N.W.2d 365, 368 (1973). In the past, Minnesota courts recognized a de facto merger exception to this general rule. *See id.* at 37-38, 206 N.W.2d at 368-69 (noting exception for situations where "the transaction amounts to a consolidation or merger of the corporation" (quotation omitted)).

In 2006, the Minnesota Legislature amended the LLC transfer statute, adding the following language:

A disposition of all or substantially all of a limited liability company's properties and assets under this section is not considered to be a merger or a de facto merger pursuant to this

⁵ In the district court, appellants also claimed that Walden's assets were fraudulently transferred to Samaritan. The district court rejected that claim, and appellants do not challenge the district court's decision on appeal.

chapter or otherwise. The transferee is not liable solely because it is deemed to be a continuation of the transferor.

2006 Minn. Laws ch. 250, art. 2, § 31, at 406.

Under the plain language of the 2006 amendment, the de facto merger exception does not apply to LLCs. Because appellants' claims against Samaritan are based on the exception, the claims fail, and the district court did not err in granting summary judgment for Samaritan.

In conclusion, our de novo review of the district court's grant of summary judgment for each respondent reveals that there is no genuine issue of material fact precluding summary judgment and that each respondent is entitled to judgment as a matter of law. We are sympathetic to appellants' claims and their likely inability to satisfy their judgments against Feeney. And we in no way intend to minimize the harm that appellants have suffered. But under current law, the record could not lead a reasonable mind to conclude that any respondent is liable for Feeney's abuse. We therefore affirm the district court's summary dismissal of appellants' claims against all respondents.

Affirmed.