FIRST DIVISION
December 2, 2013

No. 1-13-0575
2013 IL App (1st) 130575-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HILLARY GRACE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 2011 L 002031
	)	
BRISTOL RENAISSANCE FAIRE,	)	Honorable
	)	Randye Kogan,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

Held: Summary judgment in favor of defendant fair operator was proper where defendant was not involved in manufacture of a defective product, vendor was not an employee or agent of defendant, and defendant did not voluntarily undertake duty of evaluating safety of products sold by vendors at fair.

¶ 1 Plaintiff Hillary Grace was badly burned by a candle that she purchased from a vendor at the Bristol Renaissance Faire. Plaintiff sued the Faire, contending that the candle was defective and improperly tested prior to sale. The circuit court granted summary judgment to defendant, and we affirm.

¶ 2 The Faire is a Renaissance-themed outdoor festival that is held in a park in Bristol, Wisconsin for a number of weekends every year. In September 2008, plaintiff visited the Faire and purchased a candle from Debbie Alesia, one of the vendors in the Faire's marketplace. The candle used a type of flammable gel rather than wax as a fuel, and it was housed in a decorated glass vase. Alesia informed plaintiff that she handmade all of the candles that were offered for sale.

¶ 3 Plaintiff used the candle without incident several times over the next few months, usually burning it for between 15 minutes and two hours at a time. In February 2009, however, the candle had been burning for about an hour when plaintiff heard a loud pop. When she looked at the candle, she saw that the glass vase housing the candle had broken into several large pieces and that the candle flame had grown to about a foot tall. Plaintiff blew the candle out, but in the process some of the melted gel from the candle spattered on her forearm. Plaintiff quickly wiped the gel off but it left a blister on her skin. Plaintiff then took a shirt and wrapped it around the remains of the glass vase, and then she attempted to dispose of the vase in a nearby bucket. But while moving the vase, plaintiff bumped the edge of the countertop on which the vase was resting and splashed melted gel from the candle onto her hands. The gel was hot enough that it left plaintiff with second-degree burns on her hands, requiring a three-night stay in a hospital burn unit.

¶ 4 Plaintiff filed a multicount complaint against both Alesia and defendant, but later voluntarily dismissed Alesia after she declared bankruptcy. Plaintiff raised two causes of action against defendant: negligence and product liability. Plaintiff essentially contended that the candle was defective, that Alesia had not properly tested the gel candle for safety and had not

given plaintiff warnings about possible hazards, and that the Faire had not adequately screened the products that it allowed Alesia to sell at the Faire.

¶ 5 At her deposition, Alesia explained that she personally made each candle that she planned to sell at the Faire. Unlike traditional wax candles, the gel candles that Alesia made consisted of a mineral oil and gelatin-powder mixture combined with various scents and colorings. Alesia researched the formulas and materials herself, and she purchased glass specifically tempered for candles. Making each candle took about two hours, and after making a batch of candles Alesia would test a candle out of that batch. Alesia stated that she "test[ed] every batch I make by burning it in my own home, to see how it works, how it glows, how the glass works, that type of thing." It is unclear from the record how long Alesia allowed a candle to burn during the test but it was at least several hours. Alesia did not place any warning labels on her candles, but she stated that she would warn buyers to be careful around open flames and to trim the candle wick regularly.

¶ 6 Alesia was a first-time vendor at the Faire during the summer of 2008, but she did not work for defendant. Instead, she paid a flat fee of $500 for the right to sell her candles in a booth at the Faire. She was required to provide a period-appropriate costume and to abide by other Faire rules, but she paid her own insurance and did not receive any benefits or pay from defendant. Defendant did, however, have an approval process (referred to as "jurying") for products that vendors planned to sell. According to Alesia, the approval process was minimal and essentially involved presenting her candles to defendant's marketplace director, Julia Romanski. Alesia brought a sampling of about 8 to 12 candles to Romanski for approval, and Romanski rejected only those she deemed to not be period appropriate. Alesia stated that no one

from the Faire ever asked her to place a warning label on the candles and never asked her about the materials or manufacturing process that she used for the candles.

¶ 7 During her deposition, Romanski explained how the Faire's vendor system and product-approval process worked. Romanski was responsible for supervising the marketplace and managing the vendors for the Faire. Each vendor entered into a contract with the Faire, which among other things required the vendor to list any products to be sold and to "[d]isplay for sale only those products that have been juried into [t]he Faire" and to "[s]how knowledge of and demonstrate production skills for any or all products displayed (upon request of Faire management)." What exactly constituted an appropriate product is not specified in the contract, and the actual jurying process appears to be somewhat arbitrary. Although Romanski testified that she had the authority to exclude unsafe products from the Faire (one past example was a bullwhip), her primary objective was ensuring that products were consistent with the Faire's aesthetic theme. Romanski approved several of Alesia's candle designs, but she never asked how the candles were made, what materials Alesia used, or discussed any safety issues that the candles might present to customers. Romanski testified that she would not have discussed product safety with a vendor at all because vendors are largely left to run their stalls as they see fit. Vendors are merely required to maintain period attire and language, to be present on all days the Faire is open, and to abide by other rules and regulations in the Faire's participant handbook. The vendors themselves, however, provide all products for sale, pay the taxes on any items they sell, furnish their own tables, booths, or shops, and hire employees to sell their products.

¶ 8 According to plaintiff's expert witness Robert Moss, neither Alesia nor defendant took proper steps to ensure that the candles that Alesia sold were safe. According to Moss, there were several problems with the candle that Alesia sold to plaintiff. Gel candles have a higher melting

point and take longer to cool that traditional paraffin candles. Melted paraffin is unlikely to cause burns because of its low temperature and ability to rapidly cool. In contrast, melted gel can cause serious burns if it comes into contact with skin because it has a higher temperature and cannot cool off quickly. As a result, the candle industry generally follows the standards published by the American Society for Testing & Materials (ASTM) for testing gel candles. Moss attested that Alesia failed to follow two of those standards: ASTM F2058, which deals with cautionary labeling standards, and ASTM F2417, which covers fire-safety design standards for gel candles. According to Moss, standard testing protocols for gel candles require burning a gel candle for 8 hours then allowing it to cool completely, and then repeating the cycle until the fuel is exhausted. Moss attested that the break in the candle jar was caused by a thermal fracture rather than a fall or other manual force. Moss opined that proper testing of the candle batch would have revealed this flaw.

¶ 9 Following discovery, defendant moved for summary judgment, contending that it was not liable under a product-liability theory because there was no evidence that it designed, manufactured, or sold the defective candle. Defendant also argued that it was not liable under a negligence theory because, among other things, Alesia was not an employee or agent of the Faire and because the Faire did not owe any duty to plaintiff. The circuit court agreed and granted summary judgment to the Faire. Plaintiff now appeals.

¶ 10 We review summary-judgment orders of the circuit court *de novo*. See *Village of Lombard v. Department of Transportation*, 2013 IL App (2d) 121042, ¶ 23. "The purpose of summary judgment is to determine whether a genuine issue of material fact exists, not to try a question of fact. [Citation.] Summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue of material fact and the

moving party is entitled to judgment as a matter of law. [Citation.] Plaintiffs are not required to prove their case at the summary judgment stage. [Citation.] Summary judgment should be granted only when the right of the moving party is clear and free from doubt." *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011).

¶ 11 There are no disputed issues of material fact here, so the question is only whether defendant is entitled to judgment as a matter of law on plaintiff's claims. Although there are only two counts at issue here, plaintiff actually argues three different theories of liability: (1) vicarious liability for Alesia's negligence under a *respondeat superior* theory, (2) direct liability under a product-liability theory, and (3) direct liability under a negligence theory based on a voluntary undertaking. We address each in turn.

¶ 12 First, although Alesia is no longer a party to this case, plaintiff seeks to hold defendant vicariously liable for Alesia's allegedly negligent acts in manufacturing the candle and failing to warn plaintiff of its hazardous nature. Defendant can only be held vicariously liable under the doctrine of *respondeat superior*, however, if Alesia was either defendant's employee or agent and her negligent act was committed during the scope of her employment or agency. See *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163 (2007); *Lang v. Silva*, 306 Ill. App. 3d 960, 972 (1999) ("Although the terms 'principal' and 'agent' and 'employer' and 'employee' may have separate connotations for purposes of contract authority, such distinctions are immaterial for tort purposes. [Citation.] The doctrine of *respondeat superior* can be invoked where either relationship exists, allowing for a principal or employer to be held liable for acts committed by an agent or employee acting within the scope of his agency or employment. [Citations.] One who hires an independent contractor, though, is generally not liable for the negligent or intentional acts or omissions of the contractor." (Internal quotation marks omitted.)). The

critical question here is whether Alesia was an employee or agent of defendant. This is generally a question of fact, but "[t]he question may be decided as a matter of law *** when the relationship is so clear as to be indisputable." *Lang*, 306 Ill. App. 3d at 973.

¶ 13 There is "no rigid rule for determining whether a person is an agent or employee or an independent contractor," but there are number of factors that courts consider. *Doe v. Brouillette*, 389 Ill. App. 3d 595, 606 (2009). Among them are "the right to control the manner in which the work is performed; the right to discharge; the method of payment; whether taxes are deducted from the payment; the level of skill required to perform the work; and the furnishing of the necessary tools, materials, or equipment." *Id.* The right to control work is the "predominant factor," and it is the "right to control rather than the actual exercise of control that is significant." *Id.*

¶ 14 Based on the evidence in the record, it is indisputable that Alesia was not an employee of the Faire. Although defendant exercised some general control over Alesia's operation, such as by requiring period dress and speech, as well as attendance during Faire hours, Alesia managed the day-to-day operations of her business without interference from defendant. Alesia made her candles at home with materials that she purchased herself, rather than using defendant's facilities or materials. Alesia retained all of the earnings from the products that she sold and that she paid all relevant sales taxes. Defendant did not pay Alesia a salary, did not receive a percentage of sales, did not monitor Alesia's sales records, and did not dictate what prices Alesia could charge. Indeed, although defendant required Aleisia to wear a period-appropriate costume, Alesia purchased her costume herself without any input from defendant. Additionally, Alesia, not defendant, provided the tables and other items that Alesia used in her booth, and Alesia, not defendant, hired an additional employee to work in the booth. Perhaps the most important

evidence regarding defendant's right to control Alesia's conduct came from the deposition of Linda McFeters, who was the executive in charge of all Faire operations. When asked about defendant's ability to control Alesia's compliance with safety protocols regarding candle manufacture, McFeters stated, "That's not my business. That's [Alesia's] business." Similarly, McFeters testified that defendant did not have the "ability and authority to tell a vendor how much they could sell their items for," and did not "have the authority to tell the vendors *** how best to display their wares."

¶ 15 The one area where defendant did exercise a significant degree of control, however, was over which products could actually be sold at the Faire through its jurying process. But this right to approval was in fact very limited and only extended to the type of products sold, not the method and manner in which Alesia sold them or even made them. This situation is quite similar to a franchisor-franchisee relationship like the one that we examined in *Olivera-Brooks v. Re/Max International, Inc.*, 372 Ill. App. 3d 127 (2007). In that case, the franchisor had general policies that the franchisee was required to abide by, but the franchisee had complete discretion in the daily operation of its business. We found that under those circumstances the franchisor had no right to control the manner and method of work by the franchisee. See *id.* at 136. Similarly in this case, even though Aleisa was required to abide by certain conditions in order to participate in the Faire as a vendor, Alesia had full control over how she operated her business. Defendant therefore did not have the right to control Alesia in a manner that would make her either an employee or an agent for purposes of vicarious liability under *respondeat superior*.

¶ 16 Plaintiff also argues that, even if Alesia was not an employee or actual agent of defendant, she was still defendant's apparent agent. In order to establish apparent agency, however, a plaintiff must prove "(1) that the principal held the agent out as having authority or

knowingly acquiesced in the agent's exercise of authority; (2) based on the actions of the principal and agent, the third person reasonably concluded that an agency relationship existed; and (3) the third person relied on the agent's apparent authority to his detriment." *Id.* at 137. Even if we were to assume that there is some evidence in the record that defendant held out Alesia as its agent, the record is clear that plaintiff did not rely on Alesia's alleged apparent agency when she decided to purchase the candle that caused her injury. Plaintiff testified at her deposition that she was aware that the products sold by the vendors were made by the vendors themselves, not the Faire. More importantly, plaintiff stated that she would have purchased the same items even had she been aware that the vendors were not employees of the Faire. Because there is no evidence that plaintiff's decision to purchase the candle that later injured her was influenced by any perceived agency authority, apparent agency cannot be a basis of vicarious liability in this case. *Cf.*, *e.g.*, *O'Banner v. McDonald's Corp.*, 173 Ill. 2d 208, 213-14 (1997) (no evidence of reliance on apparent agency in plaintiff's decision to visit restaurant where he was injured).

¶ 17 Plaintiff alternatively argues that defendant could be directly liable under a product-liability theory. Under Illinois common law, "all entities in the distributive chain of an allegedly defective product, including manufacturers, sellers, wholesalers, distributors and lessors of the product, are strictly liable in product liability actions for injuries resulting from that product." *Murphy v. Mancari's Chrysler Plymouth, Inc.*, 381 Ill. App. 3d 768, 772-73 (2008). In this case, plaintiff contends that, by allowing Alesia to sell the allegedly defective candle at the Faire, defendant became part of the distributive chain and is thus strictly liable for plaintiff's injury. What plaintiff's argument overlooks, however, is that section 2-621(c) of the Code of Civil Procedure (735 ILCS 5/2-621(c) (West 2010)) modifies the common-law rule for members of

the distributive chain who are not manufacturers of the allegedly defective product. In order to hold those entities strictly liable, a plaintiff must not only show that they put the item into the stream of commerce but also "exercised some significant control over the design or manufacture of the product or had actual knowledge of, or created, the defect." (Internal quotation marks omitted.) *Murphy*, 381 Ill. App. 3d at 773.

¶ 18 The record unequivocally demonstrates that defendant had no role in manufacturing the candles. Alesia made each candle by hand in her own home with materials that she herself purchased and based on formulas that she personally researched. Even if we assume for the sake of argument that defendant introduced the candles into the stream of commerce by granting Alesia permission to sell the candles at the Faire, defendant's lack of participation in the manufacturing process renders it merely a nonmanufacturing member of the distributive chain and thus subject to the protections of section 2-621. Because defendant did not have any control over the manufacturing process, much less a significant one, in order to be strictly liable there must be some evidence that defendant was aware of the defect in the candle. But the record is devoid of any such evidence. Romanski testified that she was unaware of any safety protocols for testing gel candles. More importantly, she testified that she did not discuss the methods that Alesia used for manufacturing the candles. Her conversations with Alesia were limited to the aesthetic characteristics of the candles. We can find no evidence in the record that Romanski was aware of any defects in the candles that Alesia planned to sell. Without such evidence, section 2-621 precludes a product-liability claim against defendant.

¶ 19 This leaves only plaintiff's negligence claim. Plaintiff frames this as a negligent-selection case, arguing that defendant failed to properly screen Alesia and her products prior to allowing her to sell the candles at the Faire. Had defendant done so, plaintiff argues, then it

would have discovered that Alesia's candles did not carry adequate warnings and were not properly tested. For support, plaintiff relies exclusively on the fact that defendant employed a jury process to inspect products being offered for sale and that both Romanski and McFeters agreed that defendant had the authority to ban unsafe products from the Faire. Plaintiff's emphasis on jurying process, however, demonstrates that plaintiff's negligence theory is not based on negligent selection.

¶ 20 In negligent-selection cases, "a plaintiff must show that the defendant negligently hired an independent contractor that it knew or should have known was unfit for the job so as to create a danger of harm to the plaintiff. In addition, there must be a connection between the particular unfitness and the independent contractor's negligent act." *Jones v. Beker*, 260 Ill. App. 3d 481, 486 (1994). There is no evidence in this case that Alesia was unfit in some way for a position as a vendor at the Faire. Rather, plaintiff contends that defendant improperly screened and evaluated the products that Alesia planned to sell. This makes plaintiff's theory of liability more akin to a voluntary undertaking, in which "[b]y undertaking to act a defendant becomes subject to a duty with respect to the manner of performance." (Internal quotation marks omitted.) *Bell v. Hutsell*, 2011 IL 110724, ¶ 23. That is, by taking upon itself the responsibility of screening and approving the candles that Alesia planned to sell at the Faire, defendant had a duty of care in the manner in which it perform the screening.

¶ 21 Illinois employs the Restatement of Torts (Second) in interpreting the limits of the voluntary-undertaking doctrine (see *id.* ¶ 12), and section 324A spells out a defendant's potential liability to a third party:

> "One who 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, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking." Restatement (Second) of Torts § 324A (1965).

¶ 22 Even assuming for the purpose of argument that defendant should have recognized that the jury process was necessary in order to screen out unsafe products from the Faire, there are two insurmountable problems with plaintiff's theory. First, there is no evidence in this case that plaintiff was injured because she relied on the jury process. Reliance is an essential element in a negligence claim based on a voluntary undertaking, and in order to succeed on the claim plaintiffs must show that they were aware of and changed their position due to the defendant's undertaking. Here, there is no evidence that plaintiff was even aware that the jury process even existed, so she necessarily cannot have relied on the existence of the jury process when she decided to purchase the candle from Alesia. At no point in her deposition did plaintiff state that she purchased the candle because it had been screened for safety by defendant before Alesia was allowed to offer it for sale at the Faire. Without at least some evidence of reliance by the plaintiff, defendant cannot be liable for defendant's failure to properly screen the products. *Cf. Bell*, 2011 IL 110724, ¶ 27 (in voluntary-undertaking case based on defendant's stated intent to prohibit drinking at a party, no facts presented that supported an inference that any guests attending party changed their position in reliance on defendant's stated intention).

¶ 23 Second, "under a voluntary undertaking theory of liability, the duty of care to be imposed upon a defendant is limited to the extent of the undertaking." *Frye v. Medicare-Glaser Corp.*, 153 Ill. 2d 26, 32-33 (1992). Yet the record is clear that the jurying process used by defendant was limited to determining whether products were compatible with the Faire's aesthetic. Romanski testified that she was concerned only with the style and fragrances of the candles that Alesia offered for sale, and she did not concern herself with the manufacturing process or labeling of the candles. Although Romanski agreed that she had the authority to exclude unsafe products, she testified that the only metric that she used for accepting a product for sale at the Faire was whether it was period appropriate. Indeed, when asked whether she had spoken to Alesia about placing warning labels on the candles or about specifications for candle making, Romanski stated that those concerns were "her business, not mine." It is undisputable that determining product safety was not part of the jurying process. Because the approval process was limited to only determining whether a product was period appropriate, defendant had no duty to also ensure that the candles were free from defects and carried proper warnings. *Cf.*, *e.g.*, *id.* at 32-33 (where defendant's undertaking was limited to placing drowsiness warning on prescription bottle, defendant had no duty to also include warnings of all possible side effects).

¶ 24 Based on the undisputed evidence in the record, defendant is entitled to judgment as a matter of law on plaintiff's negligence and product-liability claims. Summary judgment for defendant was therefore proper.

¶ 25 Affirmed.