IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES B. THOMAS, JR. and SUSAN THOMAS, H/W	:	CIVIL ACTION
v.	:	
JUST FOUR WHEELS, INC. et al.	:	NO. 98-4904

O R D E R - M E M O R A N D U M

AND NOW, this 16th day of April, 1999, the joint motion for summary judgment of defendants Just Four Wheels, Inc.,[1] Concepcio O. Mouliert, and Proclaiming His Word is denied. Fed. R. Civ. P. 56.

This personal injury action arises from a motor vehicle accident that occurred on December 14, 1996 in Chester County, Pennsylvania. Plaintiffs' automobile was involved in a collision with a van operated by defendant Marion Kennedy and leased from defendant Just Four Wheels, Inc. by defendants Concepcio O. Mouliert and Proclaiming His Word. Compl. ¶ 8. Plaintiffs' claims are based solely on Kennedy's negligent operation of the van. Compl. ¶ 9. At the time of the accident, Kennedy was a volunteer for Proclaiming His Word, a religious organization, compl. ¶ 4, and Mouliert, who was a passenger in the van, was its pastor.

In Pennsylvania, respondeat superior liability for another's negligence ordinarily must be based on a master-servant relationship or some other relationship in which there is an

[1]On March 30, 1999 a stipulation of dismissal as to defendant Just Four Wheels, Inc. was entered. The stipulation preserves claims against its insurance carrier.

inherent right to control the actor's conduct. Otherwise, liability must be founded on an independent theory of negligence, as articulated in the lessor and passenger cases.[2]

Here, movants contend that Kennedy was not acting under the direction of Mouliert or Proclaiming His Word when he drove the van. In two interrogatories, Kennedy stated that he "was acting on his own behalf at the time of the accident." Kennedy's resp. to interrogs. 1, 19; Kennedy dep. at 45-46 (verifying his interrogatory responses). He also testified that he alone selected the driving route. Kennedy dep. at 13-14. As noted, there is no contention that movants themselves were negligent in entrusting the vehicle's operation to Kennedy.

Kennedy (not plaintiffs) opposes the motion, maintaining that since he was a volunteer driver for Mouliert and Proclaiming, there was an agency relationship that implicates the doctrine of respondeat superior. While the law recognizes the possibility of an unpaid, or volunteer, master-servant relationship, Biedenbach v.

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[2]See Jahn v. O'Neill, 327 Pa. Super. 357, 359, 475 A.2d 837, 838 (1984) ("A lessor may be held liable, however, for the lessor's own negligence in leasing the vehicle for use by a person whom the lessor has reason to know is incompetent." Id. at 359-60, 475 A.2d at 838 (citing Restatement (Second) of Torts § 390 (1965)). "A passenger does not owe a duty to a third-person . . . absent the existence of a special relationship, joint enterprise, joint venture or a right to control the vehicle. . . . To impose a duty on a passenger making him liable to others for what the driver chooses to do is inappropriate; such a rule assumes, incorrectly, that a passenger somehow shares in the management of the vehicle and the driver is amendable to the passenger's influence." Brandjord v. Hopper, 455 Pa. Super. 426, 431, 688 A.2d 721, 724 (1997) (passengers who procured and ingested alcohol did not owe duty to injured pedestrian).

Teague, 194 Pa. Super. 245, 247, 166 A.2d 320, 323-24 (1960) (following Restatement (Second) of Agency § 225), Kennedy provides little factual basis for his assertion. See Fed. R. Civ. P. 56(a); In re TMI, 89 F.3d 1106, 1116 (3d Cir. 1996) ("In responding to a motion for summary judgment, the non-moving party must . . . designate specific facts showing there is a genuine issue for trial." (quotation omitted)).

For the most part the facts proffered on this motion appear in the parties' briefs without any reference to or support from materials approved by Rule 56. On that basis alone, the motion could be granted. However, the undisputed nature of Kennedy's relationship with these defendants — a worker, albeit a volunteer — may permit the inference that they had the right to control Kennedy's driving at the time in question. The critical issue, which must be deferred to trial, is the right to control, not whether the right was actually exercised. See Moon Area Sch. Dist. v. Garzony, 522 Pa. 179, 190, 560 A.2d 1361, 1367 (1989) ("It is not . . . the fact of actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor." (quoting Feller v. New Amsterdam Cas. Co., 363 Pa. 483, 486, 70 A.2d 299, 300 (1950))).

If Kennedy is found liable, whether he can look to Proclaiming or Mouliert for relief or in some way benefit from their being on the record is also left for another day. That issue was not raised.

Edmund V. Ludwig, J.