

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DONALD R. WILD and DIANA H. WILD,
Individually and as representatives of the Estate
of Joseph Donald Wild,

Plaintiffs,

v.

KARLEEN HILLERY;
SCOTTSDALE INSURANCE COMPANY;
ACCEPTANCE INSURANCE COMPANIES;
CHOAN A. LANE, JEREMY HOLMES;
and NATIONAL PUBLISHERS EXCHANGE,

Defendants.

OPINION AND
ORDER

01-C-0461-C
01-C-0463-C

These consolidated civil cases are before the court in yet another round of the extended litigation arising out of the unfortunate death of plaintiffs' son, Joseph Wild. Plaintiffs brought a similar suit in 2000 against these same defendants (with the exception of National Publishers Exchange) and others. Plaintiff's claims were denied on motions to dismiss and for summary judgment. The court of appeals affirmed the disposition of the claims upon appeal. Plaintiffs then filed two identical suits in two different state courts in Louisiana; defendants removed the suits to federal court in Louisiana; and the federal court

transferred the cases to this court, where they have been consolidated. In previous orders in the cases, I have dismissed plaintiff's claims against defendants Heart of Texas Dodge, Inc., Universal Underwriters Insurance Company, Subscriptions Plus, Inc., Northern Progressive Insurance Company and Y.E.S.! a/k/a Youth Employment Services, Inc. and/or Young Entrepreneur Society, all of whom were named originally as defendants in these suits.

Now defendants Karleen Hillery, Scottsdale Insurance Company, Acceptance Insurance Company and National Publishers Exchange have filed motions for summary judgment, asserting that plaintiffs cannot prevail on their claims against them as a matter of law. In addition, defendant National Publishers has moved for dismissal of some of plaintiffs' claims. I conclude that the motion for dismissal must be granted as to plaintiffs' claims of misrepresentation and false advertising because plaintiffs have failed to allege those claims with specificity as required under Fed. R. Civ. P. 9(b), despite having been given an opportunity to amend their complaint solely for that purpose. I conclude also that plaintiffs cannot proceed on their newly alleged cause of action against defendant National Publishers because the order granting plaintiffs leave to amend was intended to give them an opportunity only to plead their fraud claims with particularity. I did not anticipate that plaintiffs would add new claims and plaintiffs never sought leave to amend for that purpose. Further, I conclude that plaintiffs have failed to show that they could adduce sufficient facts at trial to enable a reasonable jury to find in their favor on their claims against the moving

defendants. Therefore, defendants are entitled to summary judgments on those claims.

I. NATIONAL PUBLISHERS EXCHANGE'S MOTION TO DISMISS

In the original complaint, plaintiffs alleged in count 9 that defendant National Publishers participated in a common scheme or plan with former defendants Subscriptions Plus and Y.E.S. and with defendants Hillery and Lane that involved the making of false representations or the failure to prevent the making of false representations in order to lure young adults such as Joseph Wild into magazine sales work. In count 11, plaintiffs alleged that National Publishers was involved in a joint venture with Subscriptions Plus, Y.E.S., Lane and Hillery, making each liable for the negligence of the others. In count 12, plaintiffs alleged that defendant National Publishers participated with one or more of Subscriptions Plus, Hillery, Y.E.S. and Lane in the development of various magazine marketing and selling schemes and lured Joseph Wild from his home by false or deceptive representations about the kind and character of the work to be done, the provision of transportation, etc.

Defendant National Publishers moved to dismiss the complaint. Although I expressed doubt that plaintiffs would be able to sustain their allegations against defendant National Publishers, I denied the motion to dismiss and gave plaintiffs an opportunity to amend their pleadings to comply with the requirements of Fed. R. Civ. P. 9(b). I told plaintiffs to “identify the exact representations and advertisement they contend were false, who made

them, when and to whom and in what circumstances.” Sept. 30, 2002 Order, dkt. #89, at 13-14.

In amending their complaint, plaintiffs added 35 paragraphs, four of which relate to defendant National Publishers. In ¶ 141, plaintiffs allege in full that “National Publishers Exchange was aware of all the misrepresentations made by Karleen Hillery d/b/a Subscriptions Plus, Inc. described [in the complaint].” In ¶ 142, plaintiffs allege that industry guidelines required National Publishers to use due diligence to insure that all laws were complied with in connection with the sales of magazines but National Publishers failed to take steps to prevent Hillery’s fraudulent practices or alternatively, in ¶ 143, that defendant failed to take steps to discover that defendant Hillery was violating industry guidelines. Finally, in ¶ 144, plaintiffs allege that Joseph Wild’s death was the result of defendant National Publisher’s “intentional and/or negligent actions.” They do not identify the actions.

It is evident that plaintiffs’ amendment does not comply with the terms of the September 30 order or with the requirements of Fed. R. Civ. P. 9(b). Plaintiffs’ obligation was to provide specific details of National Publishers’ fraud. That obligation is not discharged by the allegation that defendant was “aware of all the misrepresentations made by Karleen Hillery.” Plaintiffs do not explain how National Publishers became aware of the misrepresentations or exactly what misrepresentations Hillery made or when and where she

made them. See Uni*Quality, Inc. v. Infotronx, Inc., 974 F.2d 918, 923 (7th Cir. 1992) (complaint “must plead the ‘who, what, when, and where’ of the alleged fraud”). Therefore, I will grant defendant National Publishers’ motion to dismiss counts 9 and 12 of plaintiffs’ complaint.

Although plaintiffs contend both that defendant National Publishers engaged in fraud and that defendant has some derivative or vicarious liability for Hillery’s alleged fraud, they have no more specificity for their allegations of vicarious liability than they do for their allegations of defendant’s direct liability. They do not identify with any particularity the nature of any relationship between Hillery and defendant National Publishers that would give rise to vicarious liability. See Lachmund v. ADM Investor Services, Inc., 191 F.3d 777, 782-83 (7th Cir. 1999) (plaintiff alleging fraud by principal through actions of agent must plead agency relationship under heightened standards of Rule 9(b)). For the same reason, I conclude that plaintiffs have failed to show how defendant National Publishers would have any liability for Y.E.S.’s or Lane’s negligence. (Plaintiffs are far off base when they assert in their brief that they alleged with particularity the relationship between National Publishers and the co-defendants by alleging that National Publishers “was involved in a joint venture with defendants Hillery, Subscriptions Plus, Inc., Y.E.S. and Lane, and as such had a duty to disclose.” Plts.’ Br., dkt. #149, at 7.) Although defendant has not asked for dismissal of count 11, in which plaintiffs allege that this defendant was involved in a joint venture with

Y.E.S. and Lane, plaintiffs' failure to specify any basis for their allegation of a joint venture would support dismissal of this count as well. However, I will wait to address it until I reach defendant National Publishers' motion for summary judgment, which is directed to count 11.

To the extent that plaintiffs took advantage of their opportunity to amend their complaint by adding an entirely new claim against defendant National Publishers, I will grant defendant's motion to dismiss. I said nothing in the September 30 order about adding new claims and plaintiff never asked for leave to amend to add new claims, as required under Fed. R. Civ. P. 15. When parties have litigated a matter as long as plaintiffs have litigated the liability for Joseph Wild's death, they should not be adding new claims immediately before briefing motions to dismiss and for summary judgment.

Defendant National Publishers' motion to dismiss will be granted as to counts 9 and 12 and as to the claims in paragraphs 142 - 144 of plaintiffs' Supplemental and Amending Complaint that National Publishers failed to use due diligence to prevent defendant Hillery's fraudulent practices, failed to take steps to discover that she was violating industry guidelines and engaged in "intentional and/or negligent actions."

II. KARLEEN HILLERY'S MOTION TO STRIKE

Only two claims against defendant Hillery remain, both of which allege intentional

acts. (1) She intentionally misrepresented the nature of the magazine selling jobs and (2) she advertised fraudulently for labor. (Plaintiffs alleged that she participated in a common plan or scheme to do these things but her allegation does not state an independent cause of action.) She contends that plaintiffs have no evidence to support these claims and that she is entitled to summary judgment.

Before discussing the merits of the motion for summary judgment, it is necessary to discuss defendant Hillery's motion to strike certain documents that plaintiffs filed in opposition to Hillery's motion. The first are the January 12, 2003 affidavits of plaintiffs Diana Wild and Donald Wild. According to defendant Hillery, these affidavits should be struck because they are an attempt to create issues of fact that contradict prior testimony by both plaintiffs. Defendant asserts that until plaintiffs signed these affidavits, they had never claimed to have any significant knowledge of how their son learned of the magazine sales position and what influenced him to accept it.

In plaintiffs' depositions, dkt. #181 and #182, they testified that they knew only that their son had been approached by two young women at a mall. Dep. tr. of Donald Wild, dkt. #181, at 20-21; Dep. tr. of Diana Wild, dkt. #182, at 43-47, 54-56, 58. In their affidavits, however, they aver that their son had researched the job on the internet, reviewed Subscriptions Plus's website and had told them that he was relying on the information contained on the website. In this circuit, a party may not defeat a motion for summary

judgment by relying on evidence contained in an affidavit that contradicts previous deposition testimony. Amadio v. Ford Motor Co., 238 F.3d 919, 926-27 (7th Cir. 2001). Unless the party can explain that the statement in the deposition was mistaken, that the deponent suffered a lapse of memory or that she misunderstood the questions put to her, the court is to disregard the affidavit. Id.

Plaintiffs had an opportunity to explain the discrepancies between their testimony and their affidavits but they did not utilize it. Although plaintiffs filed a brief they captioned as filed in opposition to defendant Hillery's motion to strike and motion for summary judgment, they say nothing in the brief in response to the motion to strike. They do not deny that their affidavits contain new averments and they do not make any effort to explain why they did not testify about these matters when they were deposed on September 25, 2000. In the absence of any explanation by plaintiffs for the discrepancies between their deposition testimony and their affidavits, I will do as the court of appeals directs and disregard the new affidavits.

Second, defendant Hillery has moved to strike the January 19, 2001 affidavit of Choan Lane, together with any arguments supported by averments in that affidavit. This motion will be granted. In an order entered in the previous case on February 16, 2001, this court struck the January 19 affidavit on the ground that it violated the court's December 20, 2000 order prohibiting Lane from testifying at trial about matters on which he had claimed

the Fifth Amendment during discovery. Plaintiffs have shown no reason why the court should treat the affidavit any differently in these suits.

Third, defendant Hillery has moved to strike an order entered by the Honorable John Albert on November 5, 2001, in which he held in related state cases that the courts of this state could exercise personal jurisdiction over defendant. Defendant is not seeking to exclude the legal conclusion Judge Albert reached but the factual determinations he made in reaching that conclusion. Wis. Stat. § 801.08(2) provides that “factual determinations made by the court in determining the question of personal jurisdiction over the defendant shall not be binding on the parties in the trial of the action on the merits.” It follows, as defendant argues, that if such factual determinations are not binding on the parties to the action in which the determination was made, they are not binding on parties in different actions. Plaintiffs have made no effort to explain why § 801.08(2) would not prohibit the use of the factual findings. Therefore, this motion will be granted.

Fourth, defendant Hillery has moved to strike plaintiffs’ strict responsibility misrepresentation claim, which plaintiffs raised for the first time in their brief in opposition to defendant Hillery’s motion for summary judgment. Plaintiffs have never pleaded such a claim, either in their original complaint or in their Supplemental and Amending Complaint, although they have had ample time to do so. It would be unfair to defendant to allow plaintiffs to argue an entirely new claim raised for the first time in opposition to defendant’s

motion for summary judgment. Plaintiffs deny that allowing them to raise a new claim would prejudice defendant because trial is still months away. This argument misses the point. Not only have plaintiffs had ample opportunity to allege this claim earlier in this litigation; the parties have invested considerable time and resources in their motions for summary judgment. They are entitled to some finality in the pleadings. (In any event, there is no apparent merit to the new claim. Plaintiffs do not allege any grounds for supposing that defendant Hillery had a personal legal duty to Joseph Wild, although the existence of such a duty is a prerequisite of her claim.)

Fifth, defendant Hillery has moved to strike plaintiffs' late supplemental brief in opposition to her motion for summary judgment and their supplemental response to her proposed conclusions of law in support of her motion for summary judgment. This motion will be granted. Plaintiffs had fair warning of the deadlines for filing their papers in opposition to the motion for summary judgment. Indeed, they filed their briefs and proposed findings of fact and conclusions of law before the time for filing had run. Plaintiffs never sought or obtained leave of court to file supplemental materials, whether timely or not. Therefore, plaintiffs' supplemental materials will be stricken.

Sixth, defendant Hillery has renewed the motion to strike she raised in a filing in December 2002, arguing that the court should not permit plaintiffs to allege that defendant Hillery made intentional misrepresentations to them personally and not just to their son, as

they have done in the Supplemental and Amending Complaint. The motion will be granted. As explained previously, When I granted plaintiffs leave to amend their complaint, it was for the purpose of identifying with precision the where, what and when of their fraud claims. It was not for the purpose of adding new claims against any defendants.

Finally, defendant Hillery has asked the court to impose sanctions on plaintiffs for their conduct in filing contradictory affidavits and untimely supplemental briefs and proposed conclusions of law and for asserting new claims they had not pleaded properly. The motion will be denied to the extent it is asking for sanctions in addition to the striking of the improper claims and supporting materials. Excluding the stricken matters from consideration is sufficient sanction. Otherwise, defendant Hillery's motion to strike is granted in all respects.

III. DEFENDANT HILLERY'S MOTION FOR SUMMARY JUDGMENT

For the purpose of deciding all of the pending motions for summary judgment, I find from the facts proposed by the parties that the following are material and undisputed.

UNDISPUTED FACTS

Plaintiffs Donald R. Wild and Diana H. Wild are husband and wife and parents of Joseph Wild. They are residents of the state of Louisiana and domiciled there. Defendant

Karleen Hillery is a resident of the state of Illinois and domiciled there. At all relevant times, defendant Hillery was the owner, president and chief executive officer of Subscriptions Plus, Inc. Subscriptions Plus was in the business of clearing and processing magazine subscriptions sent to it by independent distributors such as co-defendants Y.E.S. and Choan Lane.

On March 25, 1999, in Rock County, Wisconsin, Joseph Wild was a passenger in a van filled with magazine subscription salespeople, moving at a high rate of speed in an attempt to elude the police. The van crashed, killing seven of the passengers, including Joseph Wild, and injuring the rest. The passengers in the van worked for Y.E.S. Inc., an independent distributorship run by Choan Lane. Subscriptions Plus entered into an independent distributor contract with Y.E.S. that designated Y.E.S. Sales and Lane as independent contractors.

Joseph Wild began selling magazines in early January 1999, almost three months before his death. At the time he joined the crew, he was living in a college apartment, away from his parents' home. He learned about Subscriptions Plus when he was at a local mall, filling out job applications, and two young women approached him about selling magazines. Plaintiffs do not know the women's identities or the name of any person with whom Joseph Wild discussed the sales job before he took it. Joseph told his parents he was going to be selling magazines door to door for Subscriptions Plus; he did not tell them how he reached

this decision. He told his parents he had the opportunity to make “big money,” that Subscriptions Plus was going to pay for him to stay in hotels and motels around the country, that Subscriptions Plus was going to provide him transportation and that it would pay for his meals and other expenses; he did not tell them how he learned about these things. His goal was to earn enough money to pay for his college tuition.

During his conversations with his parents, Joseph Wild referred them to Subscriptions Plus’s website, which his parents reviewed. The website included information on becoming a magazine salesperson and informed those interested that they could send information to Subscriptions Plus via the internet. Other than this website, plaintiffs are aware of no documents that relate to Joseph Wild’s magazine sales job.

Tom Cole worked for Subscriptions Plus, Inc. as office manager, reporting to defendant Hillery. It was his decision to build a website for the company. Defendant Hillery was aware that Subscriptions Plus, Inc. had an internet website but she never saw it. At some time, Tom Cole placed information on the website at the request of the independent distributors. At some point, the website contained a solicitation to the effect that “If you are neat and express a desire to learn, and if you have enthusiasm” we offer “follow the sun travel,” “luxury hotel and motel living,” “transportation,” “expenses advanced” and “a complete training program.”

At some time, the website included an 800 number that magazine sales customers

could call to determine whether an independent distributor had a relationship with an independent contractor. Also at some time, Cole put an ad for employment on the website to assist the distributors in hiring salespeople. The website listed traveling job opportunities. When interested persons responded, Subscriptions Plus forwarded the information to the nearest independent distributor for his or her use.

When plaintiff Diana Wild reviewed the website, she told her son that she did not think the job was a good opportunity and that she was not in favor of his taking it. However, Joseph Wild was attracted to the idea of making money and traveling around the United States. After he had been working for some time, he reported back to his parents that he liked seeing different parts of the country, that he liked the people he worked with and that he generally liked what he was doing but was disappointed he was not making as much money as he had expected. Overall, he seemed to be enjoying himself.

Plaintiffs e-mailed Tom Cole at Subscriptions Plus on two occasions to learn Joseph's whereabouts. Subscriptions Plus gave them Choan Lane's name and phone number. Diana Wild spoke to Lane to tell him she was trying to reach her son. Lane said he would relay the message to Joseph. Joseph returned the call the next day. Although plaintiffs left several other messages on Lane's voice mail, they never spoke with Lane or their son again. Plaintiffs never spoke with anyone from Subscriptions Plus or had any conversations with anyone other than Lane that they believe was involved in selling magazines.

At no time did Joseph Wild ever mention defendant Hillery to his parents. He never entered into any agreement of any kind with either Subscriptions Plus or defendant Hillery. Plaintiffs never spoke with Hillery.

OPINION

It is understandable that plaintiffs want to assess blame for their son's untimely death and vindicate the wrong that has been done to them. Unfortunately for them, they have been unable to adduce evidence of the liability of any of the defendants other than Jeremy Holmes and Choan Lane, neither of whom carried extensive insurance or has significant private resources. They are left with trying to forge some sort of basis for liability against the other defendants out of fragmentary pieces of evidence and tenuous legal theories. Their current claims against defendant Hillery consist of only two that are even potentially viable: (1) she made intentional misrepresentations to Joseph Wild and (2) she engaged intentionally in fraudulent advertising for labor.

A. Intentional Misrepresentations

In order to sustain a claim of intentional misrepresentation, plaintiffs must prove that defendant Hillery made a false representation of fact, that she made it with the intent to defraud and for the purpose of inducing Joseph Wild to act upon it and that Joseph Wild

relied on the misrepresentation and was thereby induced to act to his detriment. Lundin v. Shimanski, 124 Wis. 2d 175, 184, 368 N.W.2d 676, 681 (1985). Plaintiffs cannot overcome the first hurdle of proving that defendant Hillery made an intentional misrepresentation to their son. They have no admissible evidence to show that Joseph Wild ever talked with defendant Hillery or relied in any way on anything she said or authorized some else to say. They know only that their son found out about the magazine sales job from two young women he met at a mall. They have no personal knowledge that he spoke to anyone else about any aspect of the job, that he consulted any written materials that defendant Hillery prepared, authorized or approved or even that any materials existed that included any misrepresentations.

Plaintiffs allege that Subscriptions Plus's website contained misrepresentations and that Joseph Wild relied upon those misrepresentations when he joined the sales crew. They have adduced no admissible evidence that the website did contain any misrepresentations. So far as the record of this case reveals, there is no evidence that crew members such as Joseph Wild did not have transportation, did not "follow the sun," did not have luxury hotel and motel living (there are references to crowded rooms in cheap motels but no evidence), did not have their expenses advanced or did not have a complete training program. But even if plaintiffs could prove the statements were false, they have not adduced any admissible evidence that defendant Hillery knew of the contents of the website or had anything to do

with them. (Plaintiffs assert in their brief in opposition to defendant's motion for summary judgment that "Hillery testified she knew this information had been placed into the website and had no objections to the contents of the website." Plts.' Br., dkt. #127, at 17. Hillery may have testified to this effect at a deposition, although she denies she did, but no transcript of any such testimony is part of this court's record.) To avoid summary judgment, plaintiffs must adduce admissible evidence to show that a reasonable jury could find in their favor at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

Even assuming that plaintiffs could clear the first two hurdles of proving that the website contained misrepresentations authorized by defendant Hillery and that the misrepresentations were made with intent to defraud for the purpose of inducing persons like Joseph Wild to rely on them, they would run into the barrier of reliance. Plaintiffs have no admissible evidence to prove their allegation that their son even saw the website, much less relied upon it. Plaintiffs argue that they can testify about conversations they had with their son in which he told them he had reviewed Subscriptions Plus's website but they are wrong. Not only have I struck the affidavits in which plaintiffs make these new averments about their son's discussions because they contradict plaintiffs' previous deposition testimony, but any statement plaintiffs' son made about looking at the website is inadmissible hearsay. It is an out-of-court statement offered to prove the truth of a matter, that matter being that Joseph Wild looked at Subscriptions Plus's website before he decided

to join the sales crew.

To show reliance, plaintiffs must establish a relationship between untrue statements made or authorized to be made by defendant Hillery and their son's decision to join the sales crew. Plaintiffs maintain that the misrepresentation was that the website gave the impression that Subscriptions Plus would provide these services whereas it was the independent distributors that were to do so. If this is plaintiffs' theory, they must be able to prove not only that Joseph saw the website but that he relied on the information contained on it and that his reliance induced him to act to his detriment. This means that plaintiffs must prove that Joseph would not have gone with the van crew on March 25, 1999, had he known that Y.E.S. and Choan Lane were providing his transportation rather than Subscriptions Plus. Plaintiffs have adduced no evidence that this is the case.

Any plaintiff that brings a tort action must be prepared to establish a causal connection between the alleged wrongful act and the injury or harm. In other words, under Wisconsin law, a plaintiff must prove that the act in question was a substantial factor in causing the harm or injury. Pfeifer v. Standard Gateway Theater, Inc., 262 Wis. 229, 236-38, 55 N.W.2d 29 (1952). It does not have to be the only factor; it need only be a substantial factor. Although this is a liberal standard, the Wisconsin courts will deny liability if an injury is too remote from the tort; the injury is too wholly out of proportion to the tortfeasor's culpability; in retrospect it appears too highly extraordinary that the harm

should have resulted from the tort; allowing recovery would open the way for fraudulent claims; or allowing recovery would enter a field that has no sensible stopping point. Stehlik v. Rhoads, 2002 WI 73, ¶ 53, 645 N.W.2d 889 (2002). Therefore, it is not enough for plaintiffs to show that if Joseph Wild had not taken the job in the sales crew not knowing the truth about the corporate structure of Subscriptions Plus, he would not have been killed three months later. They must show that the misrepresentation was a substantial factor in producing his injury.

According to plaintiffs' remaining allegations, defendant Hillery had a duty to be truthful about the circumstances of the sales job, and specifically about who was responsible for providing transportation. Even if plaintiffs could prove that she violated that duty, they could not prove that her violation was a substantial factor in causing the van crash. Had plaintiffs established that her duty was to insure that Joseph Wild had safe transportation and that she violated *that* duty, then they could say that the violation was a substantial factor in causing the crash. I have held, however, that plaintiffs cannot establish that she had such a duty. Wild v. Hillery, 01-C-0461-C, slip op. at 5-6 (W.D. Wis. Sept. 30, 2002).

If these cases were to go to trial, plaintiffs would have additional difficulties in establishing a causal link between the alleged misrepresentations on the website and their son's death because they testified at their depositions that their son was determined to join the sales crew once he heard about it and that he was unwilling to delay his decision long

enough to check the good faith of the company, its safety record or its history as an employer. According to his parents, he rejected their efforts to look into the company or even to try to find someone who had worked for the company with whom he could talk about the job. Moreover, by the time he was killed, he had been working for Y.E.S. for almost three months and would have known for himself what the transportation arrangements were (even if he did not know precisely who had the legal responsibility for making them), what the hotel accommodations were like and a lot of other things about the job. He certainly knew that he was not making the “big money” he had thought he would.

Joseph Wild died because Jeremy Holmes was criminally negligent in driving the van and because Choan Lane allowed Holmes to drive, although Lane knew or should have known that Holmes did not have a driver’s license. He did not die because defendant Hillery did not make clear on the website that Subscriptions Plus was not the actual provider of transportation or because she induced Joseph to take the sales job by promising him stays in luxury accommodations.

I conclude that defendant Hillery’s motion for summary judgment must be granted on plaintiffs’ intentional misrepresentation claim.

B. Fraudulent Advertising for Labor

Under the Wisconsin statutes, employees have a right of action for recovery of all

damages sustained in consequence of any false representation made to induce the employee to change his place of employment. Wis. Stat. § 103.43. The prohibited false representations relate to the kind and character of the work to be done, the amount and character of the compensation to be paid for work and other conditions of the employment.

Id.

Plaintiffs face the same difficulties proving this claim as they had in proving intentional misrepresentation. They must show that defendant Hillery made false representations to Joseph that were intended to induce him to change his place of employment and that Joseph relied on those representations. Their lack of evidence on these points means that defendant Hillery's motion must be granted on this claim as well.

III. INSURERS' MOTIONS FOR SUMMARY JUDGMENT

Defendants Scottsdale Insurance Company and Acceptance Insurance Companies are seeking summary judgment on the ground that they have no duty to indemnify defendant Karleen Hillery for the two remaining claims against her. Now that I have decided that plaintiffs cannot proceed on those claims, defendants' motions are moot. However, for the sake of completeness and in the event the court of appeals should disagree with the disposition of the claims against Hillery, I will explain why the two insurance companies are entitled to summary judgment in their favor, whether or not the case proceeds against

Hillery.

For the purpose of deciding this motion, I find that the following additional facts are relevant and undisputed. (Defendant Hillery has filed objections to some of the facts proposed by defendants so as not to waive her right to object later if she needs to. She and defendant Acceptance and Scottsdale have stipulated that any factual disputes among these three parties are immaterial as to issues other than insurance coverage, do not create any issues of material fact and should not impede an award of summary judgment in defendant Hillery's favor as to plaintiffs' claims against her, if the court determines that such an award is proper.)

ADDITIONAL UNDISPUTED FACTS

Defendant Scottsdale Insurance Company issued a Commercial General Liability Coverage Form, showing the named insured as Subscriptions Plus, Inc. /Karleen Humphries DBA. ("Karleen Humphries" is Karleen Hillery's former name.) According to the terms of the policy, which was in effect when Joseph Wild was killed, the company agreed to pay damages on behalf of Karleen Hillery or Subscriptions Plus because of bodily injury caused by an occurrence. "Occurrence" is defined in the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policy contains an exclusion for "expected or intended injury," that is, "[b]odily injury' or

‘property damage’ expected or intended from the standpoint of the insured.”

When defendant Hillery applied to defendant Scottsdale for insurance coverage, she represented that Subscriptions Plus, Inc. only processed orders for other companies. Aff. of Michael Fitzpatrick, dkt. #102, Exh. F. She told Scottsdale that

Subscriptions Plus, Inc. processes orders and does customer service on bulk magazine orders sold by groups, companies, and individuals. Sales persons work at phones and computers working directly with the publishing houses to process these orders. They DO NOT sell, produce or deliver these magazines. They are a clearing house.

Id. (Emphasis in original). The policy coverage was limited to a “Designated Project,” as shown in the policy. The policy shows the designated project as “processes magazine subscription orders and does customer service for magazine orders.” Aff. of Fitzpatrick, dkt. #102, Exh. E at SIC/00035.

Defendant Acceptance issued a policy of excess liability indemnity to defendant Hillery (under the name Karleen Humphries DBA Subscriptions Plus). By its terms, the policy was excess to the Commercial General Liability Policy issued by defendant Scottsdale. The policy adopted the provisions of the underlying Scottsdale policy, except for any obligation to investigate and defend and pay for costs and expenses, the amount of the limit of liability, and any other provision inconsistent with the terms of its own policy.

Both the Scottsdale and the Acceptance policies had employment related practices exclusions that excluded bodily or personal injury arising out of any employment-related

practices, policies, acts or omissions, such as coercion, demotion, etc. Both policies provided that the exclusions would apply “[w]hether the insured may be liable as an employer or in any other capacity” Aff. of Fitzpatrick, dkt. #102, Exh. E at SIC/00037; Aff. of J. Scholten, dkt. #107, Exh. C at 6th unnumbered page.

In proceedings in the Circuit Court for Dane County, Wisconsin, Subscriptions Plus, Inc. and defendant Hillery conceded that the Acceptance policy did not cover claims for fraudulent advertising for labor, misrepresentations or certain other claims and argued that Acceptance’s motion for summary judgment was moot in this respect, because there was no case or controversy as to the coverage for such claims. Aff. of Fitzpatrick, dkt. #102, Exh. C at 8. The court granted summary judgment for Scottsdale and Acceptance in that case, on the ground that their policies provided no coverage for injuries caused by an automobile accident.

OPINION

The parties agree that Oklahoma law governs because the policy was issued there. The Oklahoma courts have construed the term “accident” as “an event that takes place without one’s foresight or expectation; an undesigned, sudden, and unexpected event, chance, or contingency.” See, e.g., Massachusetts Bay Ins. Co. v. Gordon, 708 F. Supp. 1232, 1233-34 (W.D. Okla. 1989) (citing United States Fidelity and Guaranty Co. v.

Briscoe, 205 Okl. 618, 239 P.2d 754, 756 (1952)). The policy defendant Hillery purchased was for accidental acts or omissions only; it covered bodily injury *caused by an accident*. Defendants Scottsdale and Acceptance contend that this is the end of the matter: at this stage of the proceedings, plaintiffs are not asserting that defendant Hillery's acts were accidental; the only claims they are asserting are claims based on intentional acts (misrepresenting facts about Subscriptions Plus and fraudulent advertising for labor). Such acts are not unexpected happenings or unforeseen events. It follows then that any injury Hillery's acts caused is not one caused by an accident and that her acts are not covered by defendant Scottsdale's policy. Therefore, neither defendant Scottsdale nor defendant Acceptance has any liability to defendant Hillery under its policy.

In an effort to avoid this result, plaintiffs argue that Joseph Wild's death was an accident that Hillery never intended; therefore, it is covered by the policy and not excluded by the intentional act exclusion. They rely on Allstate Ins. Co. v. Thomas, 684 F. Supp. 1056, 1058 (W.D. Okla. 1988), a case in which the court held that the intentional act exclusion requires two showings: that the insured intended to commit the act and that the insured intended to commit the resulting injury. In its decision, the court relied on Lumbermens Mutual Ins. Co. v. Blackburn, 477 P.2d 62 (Okla. 1970), a case in which the Supreme Court of Oklahoma found coverage in a homeowners' policy for the acts of the insured's son, who threw a rock at a schoolmate, causing serious head injuries. The court

held that the exclusion in the policy would apply only if the insurer could prove that the insured's intention was to inflict the injury actually inflicted and that his act was directed against the party actually injured and not another. Id. at 65.

Plaintiffs' argument ignores the inconvenient fact that the exclusionary language does not even come into play unless the policy provides coverage for the acts she is alleged to have committed. Massachusetts Bay Ins. Co., 708 F. Supp. at 1233 (noting that in Blackburn, the homeowners' policy did not limit coverage to an accident or occurrence, "but simply promised to pay all sums for bodily injury for which the insured was legally liable, subject to exclusion for injuries caused intentionally by the insured"). They seem to forget as well that in opposing defendant Hillery's motion for summary judgment, they argued that defendant Hillery's intentional misrepresentations were the legal cause of the accident; in other words, that it was foreseeable her misrepresentations could cause Joseph Wild's death. Now they take an inconsistent tack, arguing that defendant Hillery's acts do not suggest the necessary intention to injure or even the expectation that injury would occur to Joseph Wild.

However, it does not follow that it can be inferred in our case, from the nature of Hillery's misrepresentations about the conditions of the independent contractors' employment, that Hillery, as reckless and uncaring as she has shown herself to be, intended the accident and/or the death of Joseph Wild.

Plts.' Br. in Opp. to Summ. J., dkt. #143, at 12. Under Oklahoma law, recovery under the theory of fraudulent misrepresentation requires a showing that the defendant made a

material misrepresentation, that was false, that the defendant knew it was false or in reckless disregard of the truth and made it with the intention that it should be acted upon by the plaintiff, that the plaintiff did act upon it and that he was injured as a result. Sturgeon v. Retherford Publications, Inc., 987 P.2d 1218,1228 (Okl. 1999). Anomalous as it may be in light of the requirements for actionable misrepresentation for plaintiffs to argue that the exclusion does not apply to defendant Hillery's acts because she did not intend or expect her acts to produce the specific harm that resulted, it is possible that Oklahoma law would permit such a reading of the policy exclusion. See Blackburn, 477 P.2d 62. It is unnecessary to decide the question because plaintiffs cannot show that the policy provides coverage for the acts they have alleged defendant Hillery committed.

Defendants Acceptance and Scottsdale assert other grounds on which to grant summary judgment. First, defendant Hillery purchased insurance that provided coverage limited to a "Designated Project," which she represented as being the processing of magazine orders and providing customer service for magazine orders; she never purchased insurance for magazine sales; therefore, her policy does not cover accidents arising out of such sales. Second, the Scottsdale and Acceptance policies included a specific exclusion for employment practices, which means that there is no coverage for plaintiffs' allegations concerning misrepresentation in the course of fraudulent advertising employees; even though plaintiff was never seeking employees and was never an employer or potential employer, the

exclusion is not limited to employers, potential employers or persons seeking employees, but applies “whether the insured may be liable as an employer *or in any other capacity*.”

Third, defendants Scottsdale and Acceptance argue that they have no liability to plaintiffs for defendant Hillery’s intentional acts because Hillery conceded that the policies at issue do not provide coverage for those acts when she advised the state court that she was not contesting Acceptance’s motion for summary judgment on that ground. They contend that third parties such as plaintiffs have no standing to challenge this concession.

Fourth, defendants argue that the state court has decided the matter of coverage; presumably, they are asserting that this court is barred from taking up the issue by the operation of claim or issue estoppel, although they do not make that assertion explicit.

Interesting as these arguments are, it is unnecessary to address any of them. It is sufficient to know that the Acceptance and Scottsdale policies do not provide coverage for defendant Hillery’s intentional acts because their coverage is limited to accidents.

V. NATIONAL PUBLISHERS EXCHANGE’S MOTION FOR SUMMARY

JUDGMENT

Only one claim remains pending against defendant National Publishers. It is plaintiffs’ eleventh cause of action, in which plaintiffs allege that defendant National Publishers is vicariously liable to plaintiffs for the acts of a joint enterprise consisting of

National Publishers, Lane, Hillery, Subscriptions Plus and Y.E.S. Defendant has moved for summary judgment on this claim, contending that plaintiffs have failed to show that each party contributed money or services to the alleged enterprise, that the parties had joint proprietorship and mutual control over the subject matter of the venture, that they had an agreement to share the profits and that they had an express or implied contract establishing the relationship. See Rupp v. American States Ins. Co., 91 Wis. 2d 628, 248 N.W.2d 318 (1979).

For the purpose of deciding this motion, I find that the following additional undisputed facts are material and undisputed.

ADDITIONAL UNDISPUTED FACTS

Defendant National Publishers Exchange is a division of Special Data Processing Corporation, a Florida corporation. It is in the business of “clearing” magazine orders for publishers. It is one of several clearinghouses that processed subscription orders that were solicited by the Y.E.S. crew.

National Publishers’ various customers send it subscription orders in electronic files that contain no information about the person who solicited the order, the sales crew or the manner in which the subscription was solicited. Before Joseph Wild’s death, defendant National Publishers had had no correspondence or any other kind of communication with

the Y.E.S. crew.

Subscriptions Plus was a customer of defendant National Publishers between 1995 and June 1999. Subscriptions Plus signed an agreement with National Publishers under which National Publishers agreed to provide clearing services for certain magazines under the terms specified in the agreement and on a non-exclusive basis. The agreement provided that Subscriptions Plus was responsible for compliance with all state and federal laws and that the agreement did not establish an employer-employee or principal-agent relationship between the parties.

Subscriptions Plus had a direct relationship with some publishers authorizing it to clear magazine subscriptions orders directly with those publishers. National Publishers was one of four clearinghouses with which Subscriptions Plus worked.

National Publishers was not informed of the nature of Subscriptions Plus's agreements with the independent distributors whose orders Subscriptions Plus forwarded, the number of crews with which Subscriptions Plus did business or the manner in which those crews operated.

Subscriptions Plus had an independent distributor agreement with Y.E.S., Inc. National Publishers was not aware of the independent distributor agreement that Subscriptions Plus had with Y.E.S., did not participate in its negotiation, is not mentioned in it and did not communicate with either Subscriptions Plus or Y.E.S., Inc. about its

business relationship and practices. National Publishers did not participate in Y.E.S.'s recruiting of new crew members or have any information about the manner in which Y.E.S. performed that recruiting. National Publishers has never placed a newspaper advertisement for sales crew members or authorized anyone to do so on its behalf.

National Publishers had no reason to believe that the Y.E.S. crew included minors or that members of the Y.E.S. crew had engaged in any illegal activity. It never received a complaint suggesting that a crew clearing orders through Subscriptions Plus included minors. Before March 25, 1999, National Publishers had never communicated with Jeremy Holmes, the driver of the van, or become aware of him or his involvement in the Y.E.S. crew. National Publishers has never paid any compensation directly to Holmes or any other member of the Y.E.S. crew.

OPINION

Why plaintiffs sued National Publishers continues to be an unanswered question in this case. They have adduced no evidence that this defendant was engaged in any wrongdoing or even had any knowledge of the allegedly wrongful acts of its co-defendants. In response to defendant's motion for summary judgment, plaintiffs offer no real argument other than to quote several pages of the Wisconsin supreme court's opinion in Collins v. Eli Lilly Co., 116 Wis. 2d 166, 342 N.W.2d 37 (1984), without explaining the purported

relevance of the case to their own. (The case involved suits against manufacturers of the drug diethylstilbestrol (DES) brought by plaintiffs injured by their mothers' ingestion of the drugs before their daughters were born and who could not identify the manufacturer of the drug.) Plaintiffs say that they do not need to explain the case's relevance because defendant bears the initial burden on a summary judgment motion. They are mistaken in this belief. In fact, plaintiffs bear the burden of setting forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). A genuine issue is one that can be resolved only by a finder of fact because it may reasonably be resolved in favor of either party. Id.

Plaintiffs do not succeed in showing that National Publishers was engaged in a joint venture with Subscriptions Plus, Y.E.S. or Lane simply by asserting that defendant National Publishers entered into a service agreement with Subscriptions Plus and that Subscriptions Plus entered into a subsequent agreement with Y.E.S. or Choan Lane or both. This is analogous to arguing that a car buyer who entered into an agreement with a dealership to buy a car is engaged in a joint venture with the manufacturer of the car. Plaintiffs seem to think that the existence of industry guidelines imposes responsibility and control on each actor in the magazine sales business, but they have shown no valid basis for this belief.

Plaintiffs have not shown that defendant National Publishers had an agreement with anyone else to share profits (as compared to earning profits on the business that

Subscriptions Plus brought in) or that it shared control with Subscriptions Plus or Y.E.S. or Lane over the subject matter of the venture. In fact, plaintiffs have not even established the subject matter of the venture. Presumably, they view it as something more than placing magazine orders so that it encompasses Joseph Wild's death. If so, they have not shown that defendant National Publishers had any express or implied contract with any sales crews and specifically, with Y.E.S. or Lane. It is undisputed that National Publishers had no information about the origin of the magazine orders they processed.

I conclude that plaintiffs have no basis on which to sue defendant National Publishers. Its motion for summary judgment will be granted.

ORDER

IT IS ORDERED that

1. Defendant National Publishers Exchange's motion for dismissal of counts 9 and 12 and any claims that defendant failed to use due diligence to prevent defendant Hillery's fraudulent practices, failed to take steps to discover that she was violating industry guidelines and engaged in intentional and/or negligent actions is GRANTED.
2. Defendant Karleen Hillery's motion to strike is GRANTED with respect to
 - a. The January 12, 2003 affidavits of plaintiffs;
 - b. The January 19, 2001 affidavit of Choan Lane;

- c. The findings of fact made by the Honorable John Albert on November 5, 2001;
 - d. Plaintiffs' strict responsibility claim;
 - e. Plaintiffs' supplemental brief in opposition to defendant Hillery's motion for summary judgment and plaintiffs' supplemental response to her proposed conclusions of law in support of her motion for summary judgment; and
 - f. Any allegations by plaintiffs to the effect that defendant Hillery made intentional misrepresentations to them personally and not just to their son;
3. Defendant Hillery's request for the imposition of sanctions in addition to the striking of the discrepant affidavits, the untimely supplemental briefs and proposed conclusions of law and the improperly pleaded claims is DENIED;
 4. Defendant Hillery's motion for summary judgment is GRANTED;
 5. Defendant Scottsdale Insurance Company's motion for summary judgment is GRANTED;
 6. Defendant Acceptance Insurance Companies' motion for summary judgment is GRANTED; and
 7. Defendant National Publishers Exchange's motion for summary judgment on plaintiffs' eleventh cause of action is GRANTED.

The clerk of court of court is directed to enter judgment for defendants Karleen

Hillery, Scottsdale Insurance Company, Acceptance Insurance Companies and National Publishers Exchange. A status conference will be held by telephone on March 21, 2003 at 1:00 p.m., Central Standard Time. Plaintiffs' counsel is to arrange a conference call with the court and counsel for the remaining defendants for the purpose of discussing further proceedings in these cases. The telephone number for the court's chambers is 608-264-5447.

Entered this 14th day of March, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge