IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD R. WILD and DIANA H. WILD,

OPINION AND
ORDER

Plaintiffs,

00-C-67-C

v.

SUBSCRIPTIONS PLUS, INC., Y.E.S.! INC., YOUTH EMPLOYMENT SERVICES, INC., KARLEEN HILLERY, CHOAN A. LANE, JEREMY HOLMES, HEART OF TEXAS DODGE, INC., SCOTTSDALE INSURANCE COMPANY, ACCEPTANCE INSURANCE COMPANIES, PROGRESSIVE NORTHERN INSURANCE COMPANY, MUTUAL FIRE AND AUTOMOBILE INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, and UNIVERSAL UNDERWRITERS OF TEXAS,[1]

Defendants.

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[1] Originally, plaintiffs sued Universal Underwriters Insurance Company. The proper defendant is actually Universal Underwriters of Texas, which issued one of the insurance contracts in dispute. I have amended the caption accordingly.

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In this civil action for monetary relief, plaintiffs Donald R. Wild and Diana H. Wild contend that the negligence of each of the defendants caused the death of their son Joseph in a van crash on March 25, 1999. Jurisdiction is present under § 1332, diversity of citizenship. Presently before the court are three motions for summary judgment filed by the following defendants: (1) Subscription Plus, Inc. and Karleen Hillery; (2) Acceptance Insurance Companies; and (3) Heart of Texas Dodge, Inc. and Universal Underwriters of Texas.

Defendant Hillery contends that Wisconsin does not have personal jurisdiction over her and therefore she must be dismissed from this case. In addition, both she and defendant Subscription Plus assert that each of plaintiffs' claims against them fails as a matter of law. Defendant Acceptance argues that its policy does not provide coverage for injuries arising from the accident. Finally, defendants Heart of Texas and Universal argue both that Universal's insurance policy does not cover that accident and that as a matter of law Heart of Texas cannot be held liable for Joseph Wild's death.

The motions for summary judgment filed by defendants Hillery, Subscriptions Plus, Heart of Texas and Universal will be granted. First, plaintiffs have failed to show that this court can exercise personal jurisdiction over defendant Hillery. Furthermore, the parties' proposed findings of fact raise no issue of fact from which a reasonable jury could find in favor of plaintiffs on their claims against defendants Subscriptions Plus, Hillery, Heart of Texas and

Universal. As an insurer of Subscriptions Plus and Hillery, defendant Acceptance could be liable only to the extent Subscriptions Plus and Hillery were found liable. With the dismissal of the negligence claims against these defendants, Acceptance's motion for summary judgment will be denied as moot. However, defendant Subscriptions Plus will not be dismissed from the case in all respects because defendant Progressive Northern Insurance Company has filed a cross claim against defendant Subscriptions Plus requesting declaratory relief regarding its duty to defend.

Before I set forth the undisputed facts, a word is required regarding their source. In an order dated September 19, 2000, dkt. #47, at 2, the parties were advised that responses to motions for summary judgment were to be "filed and served" by October 23, 2000. Because many extensions had been granted previously, the order further stated, "No further extensions of the summary judgment deadline will be granted for any party for any reason."

Plaintiffs failed to file either a brief or proposed findings of fact before the order's October 23 deadline in response to the three summary judgment motions that were filed. There is no excuse for plaintiffs' untimeliness. They were well aware of the deadline and were quick to make sure deadlines were strictly enforced against other parties. Earlier in October, plaintiffs brought a successful motion to strike defendant Progressive's motion for summary judgment when it was filed several days after the October 2 deadline.

It is disingenuous for plaintiffs to say that they "erroneously believed" only service (rather than service *and* filing) was required by October 23. The September 19 order stated

explicitly that both service and filing were required. Furthermore, in urging the court to strike defendant Progressive's motion, plaintiffs argued that the motion should be stricken because it had been *filed* (not served) after the deadline, demonstrating that plaintiffs were aware that both were required. Regardless, I rejected defendant Progressive's argument that it should have been excused for untimeliness because it was confused about the deadline. I cannot hold one party strictly accountable for deadlines and excuse others. Accordingly, both plaintiffs' briefs and proposed findings of fact in opposition to the various motions for summary judgment will be stricken.[2] (As a practical matter, this ruling makes little difference to the outcome of the motions. In many instances, plaintiffs' responses to the moving defendants' proposed facts are inadequate to put the proposed facts in dispute even if they had been considered.)

Under this court's procedures, unless the non-movant places a factual proposition of the movant into dispute, the court will conclude that there is no genuine issue as to the finding of fact proposed initially by the movant. Therefore, except to the extent that proposed findings of defendants were put into dispute by another defendant, all properly supported findings of

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[2] Just as this opinion was about to be released, I received a letter from defendant Acceptance Insurance Companies stating that it was withdrawing its motion to strike plaintiffs' brief for being untimely. Defendant Acceptance's motion was filed over a month ago and Acceptance has indicated no reason why it wishes to withdraw it now. Therefore, defendant Acceptance's eleventh hour withdrawal will be disregarded. Furthermore, regardless whether defendant Acceptance is moving to strike plaintiffs' submissions (and I note that it asked to withdraw its motion to strike plaintiffs' brief only, suggesting it wished to maintain its motion to strike plaintiffs' proposed findings of fact), those submissions were untimely nonetheless. Even if defendant Acceptance's withdrawal was to be considered, then, plaintiffs' submissions would still be stricken.

fact proposed by defendants will be accepted as true for the purpose of deciding the motions for summary judgment.

From the parties' proposed findings of fact, I find the following facts are undisputed.

UNDISPUTED FACTS

A. The Parties

Plaintiffs Diana H. Wild and Donald R. Wild are citizens of Lousiana and are the parents of Joseph Wild, who was killed in a van accident on March 25, 1999. Defendant Subscriptions Plus, Inc. is an Oklahoma corporation that was in the business of operating a clearing and processing company for magazine subscriptions. Defendant Karleen Hillery is a citizen of Illinois and the owner and president of Subscriptions Plus. Defendants Scottsdale Insurance Company provided commercial general liability insurance to defendants Hillery and Subscriptions Plus. Defendant Acceptance Insurance Companies provided excess insurance to these defendants and defendant Progressive Northern Insurance Company provided them auto insurance. Defendant Scottsdale is an Ohio corporation; defendant Acceptance is a Nebraska corporation; and defendant Progressive is a Wisconsin corporation.

Defendant Y.E.S.! Inc., or Youth Employment Services, was one of ten or eleven sales crews in 1999 throughout the country that sold the magazine subscriptions processed by Subscriptions Plus. Defendant Choan Lane, a citizen of Iowa, was the manager of Y.E.S.! Inc. Joseph Wild was a salesperson in the Y.E.S. crew.

Defendant Heart of Texas Dodge, Inc. is a Texas corporation engaged in the business of selling motor vehicles in the State of Texas. Defendant Universal Underwriters of Texas is a Texas corporation that issued an insurance policy to Heart of Texas.

B. Relationship of Subscriptions Plus, Inc., Karleen Hillery, Y.E.S.! Inc., Choan Lane, and Joseph Wild

1. Subscription Plus/Karleen Hillery's relationship with Choan Lane/Y.E.S.!, Inc.

On January 1, 1998, defendant Y.E.S./Lane and Subscriptions Plus signed a contract with each other titled "Independent Distributor Agreement." Under the agreement, which was in effect at the time of the accident, defendant Y.E.S./Lane was to "solicit and secure" magazine subscription orders for defendant Subscriptions Plus. Defendant Y.E.S./Lane was to receive 50% of each magazine order submitted. From his share of the order, defendant Lane paid for his own expenses as well as for the compensation of his sales crew.

Periodically, using defendant Subscriptions Plus's Federal Express account, defendant Lane would send the orders back to defendant Subscriptions Plus along with any checks he received.

The agreement provided that the relationship between defendants Subscriptions Plus and Y.E.S./Lane would be that of an "independent contractor. " Further, the agreement provided:

> DISTRIBUTOR IS ENGAGED IN AN INDEPENDENT BUSINESS, AND IS SOLELY RESPONSIBLE FOR THE OPERATION AND CONDUCT OF AGENTS, CONTRACTORS, SOLICITORS, OR REPRESENTATIVES. SUB. PLUS HAS NO RIGHT OR AUTHORITY TO DIRECT, CONTROL, OR OTHERWISE INTERFERE WITH DISTRIBUTOR'S BUSINESS, AND SHALL NOT PROVIDE A BUSINESS PREMISES OR PLACE FOR DISTRIBUTOR TO CONDUCT BUSINESS. DISTRIBUTOR IS FREE TO (A) ESTABLISH ITS OWN SALES METHODS; (B) OBTAIN SALES LEADS IN ANY LAWFUL MANNER; (C) SELECT ITS OWN CUSTOMERS; (D) ESTABLISH A BUSINESS PREMISES UNDER ANY TRADE NAME; (E) CONDUCT BUSINESS FROM ANY LOCATION, AND; (F) DISTRIBUTOR SHALL BE SOLE [sic] RESPONSIBLE FOR ALL ITS OWN EXPENSES, INCLUDING LICENSE FEES, TAXES, AND COMMISSIONS, BONUSES, OR OTHER REMUNERATION PAYABLE TO DISTRIBUTOR'S EMPLOYEES, AGENTS, CONTRACTORS, SOLICITORS, OR REPRESENTATIVES.

Although the agreement permitted defendant Y.E.S./Lane to choose where in the United States it would sell magazine subscriptions, once a week defendant Lane would call defendant Subscriptions Plus collect to inform it of his crew's location.

The agreement could be terminated by either party at any time and defendant Y.E.S./Lane could choose to have its magazine orders processed by another company. After defendant Subscriptions Plus terminated its agreement with defendant Y.E.S./Lane in May 1999, Lane's business processed its magazines through someone else.

Under the terms of the agreement, defendant Subscriptions Plus retained some control over defendant Y.E.S./Lane. For instance, the agreement stated several terms and conditions

with which magazine orders had to comply before defendant Subscriptions Plus would accept them, including that they "be evidenced by written agreement," that they comply with the law and that they be completely and accurately filled out. The agreement directed defendant Y.E.S./Lane more generally "to comply with all present and future laws" and "not to engage in any unfair trade or selling practice, to make no false or misleading presentation, and to deal honestly and fairly with the public." In accordance with this provision, defendant Subscriptions Plus would not clear an order if the distributor was violating the law and it told independent distributors not to hire anyone under the age of eighteen. In addition, defendant Subscriptions Plus expected distributors to follow the code of ethics of the National Field Selling Association, a non-profit organization for sales.

Some of the "day-to-day business practices" of the agreement varied from the express terms of the independent distributor agreement. For instance, defendant Subscriptions Plus provided several services to defendant Y.E.S./Lane and its other distributors that were not provided for in the agreement. One of these involved paying the distributors' personal debts. When defendant Y.E.S./Lane sent the checks that new subscribers had written back to defendant Subscriptions Plus, Subscriptions Plus would calculate how much was owed by defendant Y.E.S./Lane. If the amount of checks was worth more than what was owed, defendant Subscriptions Plus would record the excess amount and credit it to defendant

Y.E.S./Lane. If requested by defendant Lane or another distributor, defendant Subscriptions Plus would use the money credited to pay bills for the distributor. Sometimes defendant Subscriptions Plus would do this even if the distributor had nothing credited to him at the time, letting the distributor work off the balance later.

Defendant Subscriptions Plus allowed defendant Lane to have his mail sent to defendant Subscriptions Plus, which would forward it to him.

The express terms of the independent distributor agreement were not always followed, at least in defendant Y.E.S./Lane's case. Although defendant Y.E.S./Lane's agreement with defendant Subscriptions Plus provides that Y.E.S./Lane would receive 50% of the sales that it made, it actually received 35% or less as the result of a verbal agreement.

Defendant Y.E.S./Lane used the name Subscriptions Plus in a number of circumstances. When signing into motels with the sales crew, defendant Lane would sign in as "Y.E.S./Subs. Plus" or "Subscriptions Plus, Inc." This may not have been authorized by defendant Subscriptions Plus. Also, when defendant Lane obtained the van from defendant Heart of Texas Dodge, Inc., he wrote that he was employed by both Y.E.S. and Subscriptions Plus.

2. Subscription Plus's contacts with Joseph Wild and the sales crew

Defendant Subscriptions Plus maintained a website that included information on becoming a magazine salesperson. Those interested could send information to defendant Subscriptions Plus via the internet. Generally, when defendant Subscriptions Plus received this information, it forwarded the information to the distributor nearest to the location of the applicant.

No members of the sales crew received any tax document from defendant Subscriptions Plus. Defendant Subscriptions Plus imposed no sales quotas on the salespeople. However, defendant Subscriptions Plus kept records of each salesperson's sales performance. When defendant Lane sent subscription orders to defendant Subscriptions Plus, he included the names of the salespeople and the number of sales. In addition, defendant Subscriptions Plus published a newsletter that it distributed to each of the sales crews in which it identified the standing of each salesperson and top sellers for each crew.

The newsletter contained a list of "points" that each salesperson had accumulated as part of an incentive program for salespeople that promised prizes such as trips for salespeople having the most points. Defendant Subscriptions Plus would dock points from salespeople when their order forms did not conform to its procedures. For example, it would dock points if the orders had been altered, if they were illegible or had an incomplete address. The

newsletter advised salespeople that if they altered checks, they could face "[t]ermination/possible arrest."

Subscriptions Plus did not provide any tools or supplies to the salespeople. However, defendant Subscriptions Plus's name and address appeared on the sales forms that the salespeople used to take orders. The receipt that salespeople gave to customers listed a name and phone number only for defendant Subscriptions Plus. Finally, salespeople were authorized to sell only those magazines listed by Subscriptions Plus and only at the prices that defendant Lane gave them.

Like the distributors, members of the sales crew could use defendant Subscriptions Plus as an address where their mail could be sent. Defendant Subscriptions Plus would then forward the mail to defendant Lane, who would distribute the mail.

Two members of the Y.E.S. salescrew, Devann Stehm and Kaila Gillock, believed their employer to be defendant Subscriptions Plus and thought that defendant Hillery was their boss. Although there is no indication that distributors complied with defendant Hillery's requests or believed they had to, defendant Hillery would tell distributors to "get rid of" salespeople that were not selling up to expectations.

3. Relationship of Joseph Wild and the sales crew with Y.E.S.! Inc./Choan Lane

Each of the Y.E.S. salespeople was selected by defendant Y.E.S./Lane. Defendant Holmes sometimes did the interviewing and hiring. Some members of the Y.E.S. crew had signed independent contractor agreements with defendant Y.E.S., but some of the salespeople had no written employment agreements of any kind. Whether or not there was a written agreement does not appear to have affected the actual relationship between defendant Y.E.S./Lane and a salesperson.

Defendant Lane determined where in the United States the crew would sell and how long the crew would remain in a particular location. On at least one occasion in January 1999, the Y.E.S. sales crew traveled with Ultimate Power, another group selling magazines that were processed by Subscriptions Plus.

Defendant Lane decided each day the area where the crew would sell; salespeople had no input into this decision. The driver would drop each salesperson off at a specific location for about two hours, after which the driver would take the salesperson to a new location. This process was repeated until the end of the work day. At the end of the day, salespeople gave defendant Lane all the cash and checks they had collected, along with the sales receipts from that day. The crew would then travel to a motel, where defendant Lane would obtain rooms, which he assigned to the salespeople. Although defendant Lane obtained and signed for the motel rooms, he would debit the salespeople's accounts for this charge.

Defendant Y.E.S./Lane imposed sales quotas on the salespeople. Each salesperson had a quota of seven subscriptions a day. These were discussed each day at a morning meeting led by defendant Lane.

Transportation was paid for and provided by defendant Y.E.S./Lane at no charge to the salespeople. Defendant Lane selected and hired defendant Jeremy Holmes as the van driver, and paid him one dollar for every order sold. Defendant Lane also assigned each salesperson to a particular vehicle and a particular seat in the vehicle for the day.

Defendant Lane decided what percentage of each sale would be credited to the salespeople. However, sales people were not paid every day. Instead, defendant Lane would keep a record of each person's sales and pay him or her periodically.

C. The Van

On January 16, 1999, defendant Heart of Texas, Dodge, Inc. entered into a Conditional Sale and Delivery Agreement with defendant Lane in regard to a 1998 Dodge Ram 3500. Lane presented a valid driver's license from the State of Iowa as well as a proof of insurance card from Allstate Indemnity Company. Defendant Lane made a down payment of $2500, after which defendant Heart of Texas delivered the van to him. Three days later, defendant Lane was approved for credit and financing by FirstCity Funding Corporation on January 19,

1999, for the balance of the van's purchase price.

After January 16, 1999, defendant Heart of Texas never attempted to regain custody, control or possession of the vehicle. However, the van's certificate of title was never transferred from Heart of Texas to Lane because the full price was never paid.

Heart of Texas never had any contact with defendant Holmes or had any knowledge that he was driving the vehicle.

D. The Accident

On March 25, 1999, the members of the Y.E.S. sales crew, including Joseph Wild, were traveling southbound in the Heart of Texas van on Interstate 90 in Rock County, Wisconsin, returning from a day of door-to-door sales. When police began pursuing the van, which was exceeding the speed limit, the driver of the van, defendant Holmes, tried to switch seats with another passenger. In the attempt, he lost control of the vehicle and the van crashed. Seven passengers of the van were killed, including Joseph Wild, and the rest were injured.

JURISDICTIONAL FACTS

At the time of the accident, defendant Karleen Hillery lived in Oklahoma. She is currently domiciled in Illinois. She has never lived or worked in Wisconsin. The two sales crews

that she managed, Kay's Naturals and Kay's Supernaturals, never sold magazines in Wisconsin. She has never entered into any contracts in Wisconsin relating to the sale of magazines.

OPINION

A. Summary Judgment Standard

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex v. Catrett, 477 U.S. 317, 324 (1986). All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). However, the non-moving party cannot rely on the allegations of the complaint alone but must set forth specific facts sufficient to raise a genuine issue for trial. See Celotex, 477 U.S. at 324. If no reasonable jury could render a verdict in favor of the non-moving party, the motion for summary judgment must be granted. See id. at 248.

B. Motion for Summary Judgment of Karleen Hillery and Subscriptions Plus, Inc.,

1. Personal jurisdiction over Karleen Hillery

Karleen Hillery argues that she lacks the necessary minimum contacts with Wisconsin

to allow a court in this state to exercise personal jurisdiction over her. Because she has never lived or been employed in Wisconsin, never entered into any contracts in Wisconsin relating to the sale of magazines, never personally sold magazines in Wisconsin, and none of the sales crews that she managed (Kay's Naturals and Kay's Supernaturals) sold magazines in Wisconsin, she contends that her contacts with the state are insufficient to establish personal jurisdiction. Although defendant Hillery is the president of defendant Subscriptions Plus, Inc. and Subscriptions Plus has not objected to personal jurisdiction over it, defendant Hillery points out correctly that personal jurisdiction over a corporation cannot be the sole basis for jurisdiction over an officer. See Pavlic v. Woodrum, 169 Wis. 2d 585, 590, 486 N.W.2d 533, 534 (Ct. App. 1992).

Plaintiffs have the burden of establishing personal jurisdiction over defendant Hillery. See Steel Warehouse of Wisconsin, Inc. v. Leach, 154 F.3d 712, 714 (7th Cir. 1998). Therefore, although it is true that a corporate agent is not "shielded from personal jurisdiction if he, as agent of the corporation, commits a tortious act in the forum," see Oxman's Erwin Meat Co. v. Blacketer, 86 Wis. 2d 683, 692, 273 N.W. 2d 285, 289 (1979), plaintiffs bear the responsibility of demonstrating that the requirements of the Wisconsin long-arm statute were satisfied. They have not shown that defendant Hillery comitted any tortious act within Wisconsin or that any other reason exists for subjecting her to personal jurisdiction.

Accordingly, she will be dismissed from this case.

2. Negligence claims against Subscriptions Plus

In their complaint, plaintiffs alleged that defendant Subscriptions Plus breached its duty of care to Joseph Wild in the following ways: (a) failing to provide him with safe transportation; (b) failing to hire competent drivers to transport him; (c) allowing defendant Holmes to drive the van; (d) failing to properly supervise the drivers of the vehicle; and (e) committing "other acts of negligence." (Although these claims were made against both defendants Subscriptions Plus and Hillery, I will refer to Subscriptions Plus only now that I have concluded that plaintiffs have not met their burden of establishing personal jurisdiction over defendant Hillery. Had I found her subject to personal jurisdiction, the discussion in this section would apply equally to the claims against her.) Defendant Subscriptions Plus contends that each of these claims must be dismissed because they fail as a matter of law.

First, defendant Subscriptions Plus argues that it can be determined as a matter of law that defendant Y.E.S./Choan Lane's relationship with defendant Subscriptions Plus was that of an independent contractor, and that defendant Subscriptions Plus cannot be held liable for the injuries of an independent contractor's employees. Second, defendant Subscriptions Plus contends that even if it cannot be determined as a matter of law that defendant Y.E.S./Lane was an independent contractor, plaintiffs' negligence claims must still be dismissed because

Wisconsin's Worker's Compensation Act, Wis. Stat. §§ 102.01-102.89, would provide the exclusive remedy to the extent that Joseph Wild was an employee of defendant Subscriptions Plus. Therefore, regardless whether Joseph Wild had an employment relationship with defendant Subscriptions Plus or with defendant Y.E.S./Lane only, Subscriptions Plus argues, plaintiffs' negligence claims cannot survive summary judgment.

I conclude that it is unnecessary to determine the employment relationship among defendant Subscriptions Plus, defendant Y.E.S./Lane and Joseph Wild in order to decide Subscriptions Plus's motion. Further, I conclude from the parties' proposed findings of fact that no reasonable jury could find defendant Subscriptions Plus liable for plaintiffs' injuries under a theory of negligence even if defendant Subscriptions Plus were Joseph Wild's employer.

a. Liability of Subscriptions Plus as an employer

Under Wis. Stat. § 102.03(2) worker's compensation is the exclusive remedy for injuries suffered by an employee when the conditions for liability under the Worker's Compensation Act are satisfied. See Cohn ex rel. Schindell v. Apogee, Inc., 225 Wis. 2d 815, 819, 593 N.W.2d 921, 923 (Ct. App. 1999). Unless the statute does not apply, an injured employee is precluded from maintaining a negligence action against his employer. See Weiss v. City of Milwaukee, 208 Wis. 2d 95, 103, 559 N.W.2d 588, 592 (1997). Because the Worker's Compensation Act was intended to grant employers immunity from all tort liability arising from injuries to employees in exchange for absolute liability regardless of fault, the exclusive remedy

provision applies to anyone seeking to recover from the employer as a result of an injury to an employee. See Guse v. A.O. Smith Corp., 260 Wis. 403, 51 N.W.2d 24 (1952); see also Franke v. Durkee, 141 Wis. 2d 172, 413 N.W.2d 667 (Ct. App. 1987) (barring loss of consortium claim against employer brought by spouse of injured employee); Larsen v. J.I. Case Co., 37 Wis. 2d 516, 520, 155 N.W.2d 666, 668 (1968) ("the sole liability of an employer because of the injury of an employee in the course of his employment, *either to the employee or to anyone else*, is under the Workmen's Compensation Law") (emphasis added); Deluhery v. Sisters of St. Mary, 244 Wis. 254, 12 N.W.2d 49 (1943) (barring loss of services claim against employer brought by father of injured employee). In this case, plaintiffs' action is based on the death of their son, so the exclusive remedy provision would apply to them if it would have applied to Joseph Wild, even though they have suffered their own distinct injuries. See, e.g., York v. National Continental Insurance Co., 158 Wis. 2d 486, 495, 463 N.W.2d 364, 368 (Ct. App. 1990) (noting that worker's compensation benefits were parents' sole remedy against their child's employer after child was killed at work).

However, the exclusive remedy provision applies only if the conditions for liability under Chapter 102 are present. Under the act, an employer is liable if (1) the employee sustains an injury; (2) at the time of the injury, both the employer and employee are subject to the Worker's Compensation Act; (3) at the time of the injury, the employee is performing service growing out of and incidental to his or her employment; (4) the injury is not intentionally self-inflicted; and (5) the accident causing injury arises out of the employment. See Weiss, 208

Wis. 2d at 102, 559 N.W.2d at 591; Wis. Stat. §§ 102.03(1)(a)-(e). Whether these conditions are met and whether the exclusive remedy provision applies are questions of law. See Weiss, 208 Wis. 2d at 102, 559 N.W.2d at 591.

Assuming for the purpose of this discussion that Joseph Wild was an employee of defendant Subscriptions Plus (and therefore "subject to the provisions of this chapter"), the undisputed facts indicate that the conditions for liability under the act are present. Obviously, the first condition of injury is met. In regard to the second condition of coverage under the act, an "employer" is defined as "[e]very person who usually employs 3 or more employes, whether in one or more trades, businesses, professions or occupations, and whether in one or more locations." Wis. Stat. § 102.04(1)(b)1. If members of the sales crew, which consisted of at least thirteen individuals, were employees of defendant Subscriptions Plus, then Subscriptions Plus would easily meet this requirement, and therefore be "subject to the provisions of this chapter, within the meaning of s. 102.03." Wis. Stat. § 102.04(1).

The third and fifth conditions would also be satisfied. Although Joseph Wild was not in the process of selling magazine subscriptions when the accident occurred, he was "performing service growing out of and incidental to" his employment. Wis. Stat. § 102.03(1)(f) makes this clear.

> Every employe whose employment requires the employe to travel shall be deemed to be performing services growing out of and incidental to the employe's employment at all times while on a trip, except when engaged in a deviation for private or personal purpose. Acts reasonably necessary for living or incidentally thereto shall not be regarded as such a deviation. Any accident or disease arising

> out of a hazard of such service shall be deemed to arise out of the employe's employment.

See id. This provision establishes a presumption that an employee traveling on business is performing services arising out of and incidental to his or her employment at all times until he or she returns unless the presumption is rebutted by evidence to the contrary. See Wisconsin Electric Power Co. v. Labor and Industry Review Commission, 226 Wis. 2d 778, 788, 595 N.W.2d 23, 27 (1999).

In the present case, Joseph Wild was traveling on business at the time of the accident. He and all members of the sales crew were returning from a day of door-to-door sales on the way to their hotel rooms, which would be obtained by Lane. This is not deviating "for a private or personal purpose," but rather is an act "reasonably necessary for living or incidental thereto." Therefore, Joseph Wild would have been both "performing service growing out of and incidental" to his employment and in an accident that "arose out of" his employment.

Finally, with regard to the fourth condition, Joseph Wild was injured in an accident in a vehicle he was not driving. No one suggests that his injury was intentionally self-inflicted. Therefore, if it were determined that Joseph Wild was in fact an employee of defendant Subscriptions Plus, each of the conditions of liability would be met and Chapter 102 would provide plaintiffs with their exclusive remedy.

The Worker's Compensation Act would also apply if Joseph Wild was an independent contractor in relation to defendant Subscriptions Plus. Wis. Stat. § 102.07(8)(a) provides:

> Except as provided in par. (b), every independent contractor is, for the purpose of this chapter, an employe of any employer under this chapter for whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

Subsection (b) then goes on to list nine conditions, all of which must be met before an independent contractor is not considered an "employee" under the act. These need not be discussed in detail. It is clear that Joseph Wild does not meet all of them. For example, Wis. Stat. § 102.07(8)(b) requires that the independent contractor "[m]aintains a separate business with his or her own office, equipment, materials and other facilities," that he "[h]olds or has applied for a federal employer identification number," and that he "controls the means of performing the services or work." There is no evidence that Joseph Wild maintained a separate business, supplied his own facilities or had a federal employer identification. Furthermore, he did not control the means of performing the services; the large part of the sales crew's activities was directed by defendant Lane. Regardless whether Joseph Wild was an employee or an independent contractor, worker's compensation is plaintiffs' exclusive remedy against defendant Subscriptions Plus.

b. Liability of Subscriptions Plus as a non-employer

To the extent that defendant Subscriptions Plus was Joseph Wild's employer, plaintiffs' negligence claims would be precluded. However, Chapter 102 does not bar claims against a person who had no employment relationship with the one injured. See Estate of Thompson v. Jump River Electric, 225 Wis. 2d 588, 593, 593 N.W.2d 901, 904 (Ct. App. 1999); Wagner v. Continental Casualty Co., 143 Wis. 2d 379, 385, 421 N.W.2d 835, 837 (1988); see also Wis. Stat. § 102.29(1) ("The making of a claim for compensation against an employer . . . for the injury or death of an employe shall not affect the right of the employe, the employe's personal representative, or other person entitled to bring action, to make a claim or maintain an action in tort against any other party for such injury or death.") It remains to be determined whether, on the basis of the undisputed facts, defendant Subscriptions Plus could be held liable to plaintiffs if defendant Y.E.S./Lane was only an independent contractor and, consequently, Joseph Wild was an employee of defendant Y.E.S./Lane rather than of defendant Subscriptions Plus.

The general rule is that one who contracts with an independent contractor is not liable for the torts of the independent contractor. See Snider v. Northern States Power Co., 81 Wis. 2d 224, 232, 260 N.W.2d 260, 263 (1977). However, commentators have observed that the general rule "has been eroded by so many well-recognized exceptions that the rule is now primarily important as a preamble to the catalogue of its exceptions." 41 Am. Jur. 2d,

Independent Contractors § 29, at 429 (1995).

One exception to the general rule of nonliability in Wisconsin is a situation in which the principal employer has a non-delegable duty to the employees of the independent contractor. In such a situation, the principal employer is vicariously liable for the tortious conduct of the independent contractor. See Brooks v. Hayes, 133 Wis. 2d 228, 233, 395 N.W.2d 167, 169 (1986). The idea of a non-delegable duty rests on the premise that some responsibilities are so important that the risks of performance cannot be bargained away. See Estate of Thompson, 225 Wis. 2d at 595, 593 N.W.2d at 905. The duty may be imposed by statute, contract, franchise or charter, or common law. See id.

I am not aware of any statute that would impose a non-delegable duty on defendant Subscriptions Plus in this situation. It is clear that defendant Subscriptions Plus did not assume through its contract with defendant Y.E.S./Lane a duty to provide safe transportation, to insure the hiring of competent drivers or to supervise the drivers of the van. In fact, the "Independent Distributor Agreement" that defendant Subscriptions Plus had with defendant Y.E.S./Lane states expressly that the "[d]istributor . . . is solely responsible for the operation and conduct of agents, contractors, solicitors, or representatives."

Although Wisconsin common law imposes a non-delegable duty upon the principal employer under circumstances involving employment that is an "abnormally dangerous activity

. . . in which the risk of harm remains unreasonably high no matter how carefully it is undertaken," see Estate of Thompson, 225 Wis. 2d at 595, 593 N.W.2d at 905 (internal quotations omitted), neither selling magazine subscriptions nor driving a van is an "abnormally dangerous activity." Cf. Lofy v. Joint School District #2, City of Cumberland, 42 Wis. 2d 253, 263, 166 N.W.2d 809, 813-14 (1969) (holding that operation of bus not inherently dangerous for purpose of non-delegable duty). Therefore, defendant Subscriptions Plus cannot be held liable as the result of a nondelegable duty.

Wisconsin common law would also impose vicarious liability on defendant Subscriptions Plus if the doctrine of apparent authority applies. See Pamperin v. Trinity Memorial Hospital, 144 Wis. 2d 188, 203, 423 N.W.2d 848, 854 (1988). In Pamperin, the court stated:

> Under apparent authority, a principal may be held liable for the acts of one who reasonably appears to a third person, through acts by the principal or acts by the agent if the principal had knowledge of those acts and acquiesced in them, to be authorized to act as an agent for the principle . . . For liability to exist, three elements must be present: (1) Acts by the agent or principal justifying belief in the agency; (2) knowledge thereof by the party sought to be held; (3) reliance thereon by the plaintiff, consistent with ordinary care and prudence.

See id. Although some members of the sales crew believed they were employed by defendant Subscriptions Plus, there are no facts suggesting that Joseph Wild or plaintiffs believed that defendant Y.E.S./Lane was an agent of defendant Subscriptions Plus or, if they did, that they relied on such a belief in any way. Therefore, defendant Subscriptions Plus cannot be held

liable because of apparent authority.

Finally, defendant Subscriptions Plus could be liable to plaintiffs for the acts of an independent contractor if defendant Subscriptions Plus committed an affirmative act of negligence. Under this exception, a principal employer may be liable to the employees of an independent contractor if the principal employer commits "an affirmative act of negligence which increased the risk of injury.'" Wagner, 143 Wis. 2d at 389, 421 N.W.2d, at 839 (quoting Barth v. Downey Co., Inc., 71 Wis. 2d 775, 783, 239 N.W.2d 92, 96 (1976)). However, the principal employer cannot be held liable for only "passive inaction or a failure to take steps to protect the plaintiff from harm." Wagner, 143 Wis. 2d at 389, 421 N.W.2d at 839 (internal quotations omitted). Examples of "passive" acts include negligent hiring, see id. at 390, 421 N.W.2d at 839, and failing to discover and act on safety violations of the independent contractor, see Estate of Thompson, 225 Wis. 2d at 601, 593 N.W.2d at 907. Because all of plaintiffs' allegations involve "failures" (failure to supervise, failure to provide safe transportation, failure to hire a competent driver, failure to stop Holmes from driving), they could not be considered "active misconduct constituting an affirmative act." Wagner, 143 Wis. 2d at 389, 421 N.W.2d at 839.

On the basis of the undisputed facts, then, if defendant Y.E.S./Lane was determined to be an independent contractor, defendant Subscriptions Plus could not be held liable for

defendant Y.E.S./Lane's tortious conduct. Of course, this does not mean that Subscriptions Plus would not be liable for its *own* tortious conduct against plaintiffs. See 41 Am. Jur. 2d, *Independent Contractors* § 30, at 429 (1995) ("Although one who employs an independent contractor may escape liability for such contractor's negligence, the employer is nevertheless answerable for its own negligence.") As noted above, plaintiffs alleged in their complaint that Subscriptions Plus had failed to hire a competent driver. If Subscriptions Plus had retained control over the selection of the van driver, Subscriptions Plus could be found to be negligent in this regard and potentially liable to plaintiffs for the death of their son. See United States Fidelity & Guaranty v. Frantl Industries, 72 Wis. 2d 478, 487, 241 N.W.2d 421, 426 (1976) (citing Restatement (Second) of Torts §§ 410, 414) (stating that principal employer liable for own negligence when it orders certain performances or retains control of certain aspects). However, the undisputed facts are that defendant Subscriptions Plus did not direct defendant Y.E.S./Lane to choose defendant Holmes as the driver but rather lacked any involvement in the decision.

Plaintiffs alleged that defendant Subscriptions Plus was negligent in allowing defendant Holmes to drive the van, suggesting a negligent entrustment claim. Such a claim would not depend on an employment relationship between defendants Subscriptions Plus and Y.E.S./Lane or the sales crew, but would require only satisfaction of the elements for negligent entrustment.

Courts in Wisconsin have adopted two theories of negligent entrustment. First, under Restatement (Second) of Torts § 308, "liability can arise when any person . . . who has a vehicle under his control permits another to use the vehicle if he knows, or should know that the other is unable to manage the vehicle and, therefore, injury to others is likely to result." Bankert v. Threshermen's Mutual Insurance Co., 110 Wis. 2d 471, 476, 329 N.W.2d 150, 153 (1983). In addition, a person who "supplies" a piece of property may be liable for negligent entrustment if the supplier should have known that because of "youth, inexperience, or otherwise," the person to whom he gave, lent or sold the property would "use it in a manner involving unreasonable risk of harm to others whom the supplier should expect to share in or be endangered by its use." Restatement (Second) of Torts § 390 (adopted by Halverson v. Halverson, 197 Wis. 2d 525, 530, 541 N.W.2d 150, 153 (Ct. App. 1995)).

Plaintiffs have failed to establish a prima facie case of negligent entrustment because they have failed to adduce any evidence that the van defendant Holmes was driving was either under the control of defendant Subscriptions Plus or supplied by it. The undisputed facts show that the van was obtained from defendant Heart of Texas Dodge, Inc. and purchased by defendant Lane. Therefore, plaintiffs' negligent entrustment claim fails as a matter of law.

In sum, even when the facts are viewed in the light most favorable to plaintiffs, no reasonable jury could find in their favor on their negligence claims. To the extent that Josesph

Wild was employed directly by defendant Subscriptions Plus, plaintiffs' exclusive remedy would be under worker's compensation. Alternatively, to the extent that defendant Y.E.S./Lane was an independent contractor of defendant Subscriptions Plus and Joseph Wild was employed by defendant Y.E.S./Lane, defendant Subscriptions Plus cannot be held liable for the tortious acts of its independent contractor. Finally, the undisputed facts do not show that defendant Subscriptions Plus's own negligence contributed to the accident. Accordingly, defendant Subscription Plus's motion for summary judgment will be granted with respect to plaintiffs' negligence claims.

3. Breach of agreement claim

In Count Four of plaintiffs' complaint, they allege that defendant Subscriptions Plus "breached [its] agreement to provide Joseph Donald Wild with safe transportation." Because there is no evidence in the parties' proposed findings of fact that defendant Subscriptions Plus and Joseph Wild ever entered into such an agreement, defendant Subscription Plus's motion for summary judgment in regard to this claim must be granted as well.

C. Acceptance Insurance Companies' Motion for Summary Judgment

The motion filed by defendant Acceptance Insurance Companies for summary judgment

is based on the contention that although Acceptance was the insurer of defendants Subscriptions Plus and Karleen Hillery, the policy it issued did not cover this accident. Thus, defendant Acceptance argues, it cannot be held liable to plaintiffs because it has no duty to indemnify defendant Subscriptions Plus or defendant Hillery. Because the motion for summary judgment filed by defendant Subscriptions Plus will be granted in all respects, defendant Acceptance's motion is moot. There can be no duty to indemnify without liability on the part of the insured. Accordingly, defendant Acceptance's motion will be denied as moot.

D. The Motion for Summary Judgment of Heart of Texas Dodge, Inc. and Universal Underwriters of Texas

Plaintiffs alleged in their complaint that defendant Heart of Texas Dodge, Inc. did not actually sell a van to defendant Lane on January 16, 1999, but instead entered into a "Conditional Sale and Delivery Agreement" that was never completed. Therefore, plaintiffs alleged, defendant Heart of Texas owned and controlled the van at the time of the accident and can be held liable for "[n]egligently entrusting the Vehicle to persons who were not fit or qualified to drive the vehicle in a safe manner." Plfs.' Cpt., dkt. #19, at ¶26. In addition, plaintiffs alleged that the insurance policy defendant Heart of Texas purchased from defendant Universal Underwriters of Texas provided coverage for the accident.

In their brief supporting their motion for summary judgment, defendants Heart of Texas and Universal raise the following contentions: (1) defendant Universal's insurance policy does not provide coverage for the accident; (2) defendant Heart of Texas cannot be held liable for negligent entrustment because it did not own the van at the time of the accident; (3) there is insufficient evidence for a reasonable jury to hold defendant Heart of Texas liable for negligent entrustment; and (4) holding defendant Heart of Texas liable would be against Wisconsin public policy and a violation of the contract clause of the Constitution. Because I conclude that the parties have failed to adduce sufficient evidence to allow a reasonable jury to conclude that defendant Heart of Texas is liable for negligent entrustment, it is unnecessary to address the other arguments of defendants Heart of Texas and Universal.

As noted above, Wisconsin recognizes two theories of negligent entrustment. One who has a vehicle under her control, see Bankert, 110 Wis. 2d at 476, 329 N.W.2d at 153, and one who "supplies" a piece of property may be liable for negligent entrustment. See Halverson, 197 Wis. 2d at 530, 541 N.W.2d at 153. Under either theory, whether the defendant is alleged to have controlled the vehicle or merely supplied it, a plaintiff must establish that the alleged tortfeasor knew or should have known that the entrustment would create an unreasonable risk of harm to others.

As defendants Heart of Texas and Universal observe, neither the Supreme Court of

Wisconsin nor the Wisconsin Court of Appeals has addressed the question whether a claim for negligent entrustment can be established in the context of a vehicle sale. Defendants Heart of Texas and Universal ask this court to issue a per se rule that a claim for negligent entrustment cannot be predicated on the sale of a vehicle, even where the sale is conditional in nature. I will leave that issue to be decided by the state courts of Wisconsin because its resolution is unnecessary to the determination of this motion. Even if a negligent entrustment claim could be based on a conditional sale, the elements of negligent entrustment have not been met in this case. There are no facts proposed that would suggest defendant Heart of Texas either knew or should have known that Lane intended to use the vehicle in a way that would create an unreasonable risk of harm to others or that he was likely to do so.

First, plaintiffs did not allege in their complaint that defendant Heart of Texas had any involvement in selecting defendant Holmes as the van driver or that defendant Heart of Texas knew that defendant Lane would choose someone without a license to drive the van. Furthermore, no facts have been proposed that would suggest defendant Heart of Texas should have known that defendant Lane would use the vehicle in a way that would create an unreasonable risk of harm to others. When defendant Lane obtained the vehicle from defendant Heart of Texas, he had a valid driver's license issued by the State of Iowa and proof of insurance from Allstate Insurance Company. In short, there was no reason for defendant

Heart of Texas to conclude that the vehicle would be used negligently. Accordingly, the motion for summary judgment filed by defendants Heart of Texas and Universal will be granted.

ORDER

IT IS ORDERED THAT

1. The submissions filed by plaintiffs Donald R. Wild and Diana H. Wild in response to the motions for summary judgment filed by defendants Karleen Hillery, Subscriptions Plus, Inc., Acceptance Insurance Companies, Heart of Texas Dodge, Inc. and Universal Underwriters of Texas are STRICKEN as untimely.

2. Plaintiffs' motion to enlarge the time for filing is DENIED.

3. The motion for summary judgment filed by defendant Karleen Hillery is GRANTED.

4. The motion for summary judgment filed by defendant Subscriptions Plus is GRANTED with respect to plaintiffs' breach of agreement and negligence claims against this defendant.

5. Defendant Acceptance Insurance Companies' motion for summary judgment is DENIED as moot.

6. The motion for summary judgment filed by defendants Heart of Texas Dodge, Inc. and Universal Underwriters of Texas is GRANTED.

7. Defendants Karleen Hillery, Acceptance Insurance Companies, Heart of Texas Dodge, Inc. and Universal Underwriters of Texas are DISMISSED from this case.

Entered this 6th day of December, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge