STATE OF MICHIGAN

COURT OF APPEALS

TIMOTHY BYZEWSKI and KATHLEEN BYZEWSKI,

Plaintiffs-Appellants,

v

AEROTEK, INC., and GENERAL MOTORS CORPORATION,

Defendants-Appellees,

and

JEFFREY ALAN BAUMBACH,

Defendant.

UNPUBLISHED
January 20, 2004

No. 242676
Oakland Circuit Court
LC No. 1999-016119-NI

Before: Wilder, P.J., and Griffin and Cooper, JJ.

PER CURIAM.

Plaintiffs Timothy Byzewski and Kathleen Byzewski appeal by leave granted an order of the circuit court granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants Aerotek, Inc., and General Motors Corporation (GM). We affirm as to Aerotek; we reverse as to General Motors.

I

The relevant facts are summarized in the circuit court's opinion:

> This action arises from an automobile accident, which occurred at approximately 4:30 p.m. on May 20, 1998. Defendant Baumbach was driving his 1992 Corvette on I-75 at a high rate of speed and weaving in and out of traffic when he lost control of the vehicle, skidded across the center median and collided with plaintiff's vehicle. As a result of the accident, plaintiff was seriously injured. Baumbach pled no contest to felonious driving and was sentenced to one year in jail. At the time of the accident, Baumbach was employed by defendant Aerotek. Pursuant to a contract between Aerotek and defendant GM, Baumbach was sent to work at GM as a fee for service contract engineer. On the day of the accident,

Baumbach had attended a seminar at the GM Pontiac facility. There is conflicting testimony about whether Baumbach was driving home or to the GM Flint facility, at the time of the accident. Plaintiff brought the instant action against Baumbach, Aerotek and GM.

In granting summary disposition in favor of Aerotek, the circuit court ruled:

> There is no evidence to show that Aerotek could have reasonably foreseen a risk of harm to a third party by Baumbach's reckless driving while returning from the GM seminar. Aerotek did not instruct Baumbach to drive recklessly, at a high rate of speed, nor could it control Baumbach's driving. There is no vicarious liability for torts intentionally or recklessly committed by an employee beyond the scope of his employer's business.

Next, in granting summary disposition in favor of defendant General Motors, the lower court correctly stated that "[u]nder Michigan law, the control test is used to determine the existence of an employer-employee relationship in claims alleging respondeat superior. *Norris v State Farm Fire* [*& Casualty Co*], 229 Mich App 231; [581 NW2d 746](1998)." However, the circuit court then held that General Motors had no respondeat superior liability to plaintiffs because of a contract between General Motors and Aerotek, which specified that under no circumstances should employees such as Baumbach be considered the agents of General Motors:

> The Court finds that under the control test, GM was not Baumbach's employer. The contract between GM and Aerotek provides that employees furnished by Aerotek will remain Aerotek's employees and under no circumstances are such employees to be considered as GM's employees or agents. GM did not pay Baumbach or provide any benefits. Aerotek determined Baumbach's compensation and paid him. Baumbach submitted time sheets and mileage and expense forms to Aerotek. The language of the contract and the circumstances under which Baumbach worked at GM, establish that Aerotek did not resign full control as his employer. Therefore, under Michigan law, only Aerotek can be held vicariously liable for the injuries caused to Plaintiff by Baumbach.

Plaintiffs now appeal the dismissal of both Aerotek and General Motors.[1]

II

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties.

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[1] Plaintiffs' claims against Baumbach have been stayed by the trial court pending the outcome of this appeal.

MCR 2.116(G)(5). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters,* 451 Mich 358; 547 NW2d 314 (1996).

III

Defendant Aerotek, Inc.

On appeal, plaintiffs first argue that Baumbach's act of driving, while returning from the GM seminar, was outside of the scope of employment because, as a matter of law, he was driving recklessly. Recently in *Rogers v JB Hunt Transport, Inc,* 466 Mich 645, 651; 649 NW2d 23 (2002), our Supreme Court set forth the following general principles that control the issue whether an employer is liable for an employee's conduct under the respondeat superior doctrine.

> "[A] master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment." *Murphy v Kuhartz*, 244 Mich 54, 56; 221 NW 143 (1928). An employer is not vicariously liable for acts committed by its employees outside the scope of employment, because the employee is not acting for the employer or under the employer's control. For example, it is well established that an employee's negligence committed while on a frolic or detour, *Drobnicki v Packard Motor Car Co*, 212 Mich 133; 180 NW 459 (1920), or after hours, *Eberle Brewing Co v Briscoe Motor Co*, 194 Mich 140; 160 NW 440 (1916), is not imputed to the employer. In addition, even where an employee is working, vicarious liability is not without its limits. For example, we have held that "there is no liability on the part of an employer for torts intentionally or recklessly committed by an employee beyond the scope of his master's business." *Bradley v Stevens*, 329 Mich 556, 562; 46 NW2d 382 (1951).

Plaintiffs argue that based on this record, a genuine issue of material fact exists whether Baumbach was driving either negligently or recklessly. While we agree with the trial court that reckless conduct is legally distinguishable from negligent conduct, see, generally, *Maiden, supra* at 122-123, we disagree with the trial court's conclusion that as a matter of law no reasonable person could find defendant's conduct to be negligent as opposed to reckless. We agree with plaintiffs that Baumbach's degree of culpability is a matter for the trier of fact. *Case v Consumers Power Co*, 463 Mich 1, 7; 615 NW2d 17 (2000); *Riddle v McLouth Steel Products Corp,* 440 Mich 85, 96; 485 NW2d 676 (1992).

In addition and most importantly, even if Baumbach's conduct was reckless, such conduct is not conclusive regarding whether Baumbach was acting outside the scope of his employment at the time of the accident. The issue still remains whether the agent was engaged in his master's business at the time of the accident and whether the principal had the right of control of the agent. *Rogers, supra*.

Like the present case, in *Hoffman v JDM Assoc*, 213 Mich App 466; 540 NW2d 689 (1995), we addressed the scope of respondeat superior liability regarding a loaned servant. In *Hoffman,* we held that unlike the worker's compensation arena in which the economic reality test applies, in tort cases claiming respondeat liability superior, the control test governs. See also

Norris, supra. Further, we held that the right to control, not the actual control of the agent, is dispositive.

In the present case, although Baumbach relied on Aerotek for his wages, the evidence is undisputed that Aerotek relinquished to General Motors the day-to-day control of this loaned servant. Aerotek had no right to exercise control over Baumbach at the time he was returning from the GM seminar. Thus, plaintiffs did not sustain their burden of submitting documentary evidence to create an issue of fact in regard to Aerotek's alleged control of Baumbach. *Maiden, supra* at 121; MCR 2.116(G)(4). For this reason, the decision of the circuit court to grant summary disposition in favor of Aerotek was the correct result.

IV

Defendant General Motors Corporation

However, the trial court erred in granting summary disposition in favor of defendant General Motors on the right of control issue. As previously explained, plaintiffs submitted ample evidence to the effect that General Motors retained the right of control of Baumbach at the time of the accident. Baumbach's relationship with General Motors is detailed as follows in plaintiffs' appeal brief:

> In the 1990s, the General Motors engineering function was performed by a combination of engineers, some actually employed by General Motors and some subcontracted to General Motors by others. Often, the subcontracted engineers later became hired to work directly for General Motors (as defendant Baumbach was subsequent to this incident). In actual practice however, within a particular facility the actual engineers and subcontract engineers worked in tandem and cooperatively, as is illustrated at the Midsize Luxury Car Group Division where defendant Baumbach worked.
>
> Defendant Baumbach joined Aerotek in 1994, and, pursuant to Aerotek's contract with General Motors was immediately sent over to General Motors to work as a service contract engineer. He was assigned by General Motors to the Midsize Luxury Car Group (MLCG). This group included defendant Baumbach, Tony Otero (who was an employee of Modern Engineering subcontracted to General Motors), and Scott Stofisz, a General Motors employee. All three had offices together (cubicles with desks) at the General Motors facility at the General Motors engineering facility at 4100 Saginaw Road in Flint. A General Motors employee, Richard Jones, the engineering group manager for the bumper and grill systems group, was described as being the supervisor of their work, and, in his absence (he was on sick leave the day of the crash), another General Motors' employee, Stuart Brown, acted as temporary group manager.
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> Baumbach remained working with this same engineering group from 1994 until the time of this incident, while remaining an Aerotek employee. He would keep track of his hours spent working for General Motors (on the honor system, apparently no one checked his hours), as well as any travel expenses, and would turn these in every week. General Motors would then pay Aerotek for the billed

> services of Baumbach, and Aerotek, in turn, issued a paycheck to Baumbach, which he picked up from Zdanowski, an Aerotek employee working out of a nearby building. Health and insurance benefits were provided through Aerotek.

Contrary to the ruling of the circuit court, defendant General Motors' respondeat superior duty, if any, to plaintiffs is not abrogated by the contract between defendants Aerotek and General Motors. While the allocation of liability between defendants may be governed by the contract, plaintiffs were not part of the contract and therefore are not bound by it. As our Court explained in *Roostertail, Inc v Patti Page, Pattack, Inc,* 32 Mich App. 94, 102; 188 NW2d 224 (1971):

> The actual relationship of the parties, not merely their characterization of that relationship, is relevant. The distinction between an independent contractor and an employee must be determined from the total relationship of the parties, including, but not limited to, the terms of their contract.

In addition, in *Lincoln v Fairfield-Nobel Co,* 76 Mich App 514, 520; 257 NW2d 148 (1977), we stated:

> The manner in which the parties designate the relationship is not controlling. If an act done by one person on behalf of another is in its essential nature one of agency, then he is an agent regardless of the title bestowed upon him.

For these reasons, the contract between defendants does not control General Motors' respondeat superior liability to plaintiffs.

In summary, there are genuine issues of material fact on the issue whether at the time of the accident Baumbach was acting within the scope of his employment with General Motors. As noted by the circuit court, there is conflicting testimony whether Baumbach was driving home or to his GM office at the time of the accident. In addition, Baumbach's alleged recklessness is also a consideration in deciding whether he was acting within the scope of his employment. On this record, the question whether Baumbach was acting within the scope of his employment at the time of the accident is a matter to be decided by the trier of fact.

Affirmed as to defendant Aerotek; reversed as to General Motors and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Jessica R. Cooper