

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LAMAR MORELAND,

Plaintiff-Appellant,

v

JOY & GREENFIELD AMOCO, AMOCO OIL  
COMPANY, and HASSAN BEDOUN,

Defendants-Appellees.

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UNPUBLISHED

March 31, 2000

No. 210543

Wayne Circuit Court

LC No. 96-621335 NO

Before: Murphy, P.J., and Hood and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motions for summary disposition. We reverse.

In January 1994, plaintiff's vehicle was towed by defendant Joy & Greenfield Amoco to its service station, owned and operated by defendant Hassan Bedoun. Plaintiff agreed to pay \$35 for the performance of diagnostic work, but did not authorize any repairs to his vehicle. Plaintiff alleged that defendant Joy & Greenfield Amoco nonetheless performed repairs which were unwarranted and unauthorized. When plaintiff expressed his dissatisfaction, employees of defendant Joy & Greenfield Amoco allegedly threatened to disassemble plaintiff's vehicle, threatened to report plaintiff to police for an alleged robbery, and pushed and grabbed plaintiff. To avoid the threats and abuse, plaintiff paid the disputed charges, but reported the incident to the Michigan Bureau of Automotive Regulation. According to plaintiff, he was directed by the state investigator to return to the station and obtain a refund for their improper action. However, when plaintiff returned to the station in July 1994, to obtain his refund, racial epithets were shouted at him, and he was assaulted and beaten repeatedly by employees of the station. Plaintiff filed a complaint alleging negligence by defendant Joy & Greenfield Amoco, breach of contract by defendant Joy & Greenfield Amoco, negligent infliction of emotional distress by defendant Joy & Greenfield Amoco, ethnic intimidation by defendants Joy & Greenfield Amoco and Bedoun, breach of contract by defendant Amoco Oil, and breach of contract by defendant Bedoun.

On October 16, 1997, defendant Amoco Oil Company filed its motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant Amoco Oil Company asserted that, pursuant to its lease with co-defendant Joy & Greenfield Amoco, it did not retain possession and control of the premises, and therefore, liability was precluded. In support of summary disposition, defendant Amoco Oil Company submitted a copy of its lease agreement with co-defendant Joy & Greenfield Amoco. Also on October 16, 1997, defendants Joy & Greenfield Amoco and Bedoun moved for summary disposition pursuant to MCR 2.116(C)(10). These defendants asserted that the claim for assault and battery was barred by the statute of limitations. They also asserted that there was no evidence that employees of the station were acting within the scope of their employment during any alleged assault, and therefore, Bedoun, as the employer, could not be held liable for their actions. Additionally, it was asserted that there was no evidence that Bedoun or the station qualified as a “person” subject to the liability of the ethnic intimidation statute. The only documentary evidence submitted with this motion for summary disposition was a copy of the complaint.

On November 21, 1997, a hearing was held regarding the dispositive motions. Counsel for plaintiff did not appear, and a written response was not filed in opposition to the dispositive motions. The trial court did not address the merits of defendants’ motions, but rather, granted the motions based upon plaintiff’s failure to file written responses.

On December 19, 1997, all defendants filed a second motion for summary disposition seeking summary disposition of “counts” 8-14, 16, 26, 35-39, and 54-65 of the complaint pursuant to MCR 2.116(C)(7). However, defendants inappropriately entitled the motion as seeking dismissal of “counts” when it actually sought to dismiss the various paragraphs of the complaint which referenced the breach of contract claims alleged against each defendant. Specifically, defendants alleged that plaintiff had been refunded the \$89 charged for repairs to his vehicle. Therefore, plaintiff’s claim of breach of contract was barred by payment. In support of summary disposition, defendants submitted two pages from plaintiff’s deposition wherein he acknowledged that he received a refund through an intermediary.

On January 9, 1998, a hearing was held regarding plaintiff’s motion for reconsideration of the orders granting defendant Amoco Oil Company’s motion for summary disposition and partial summary disposition granted in favor of defendants Joy & Greenfield Amoco and Bedoun. At this hearing, plaintiff’s counsel stated that he had filed a response to the motions, but did not appear in court because it had “slipped my mind.” The trial court requested a copy of the response although a copy of the response was not preserved in the lower court record. All parties agreed to adjourn the hearing regarding the motion for reconsideration until a transcript of the initial hearing could be obtained. Additionally, it appears that defendants agreed to move the hearing regarding the second motion for summary disposition.

On January 23, 1998, a hearing was held regarding plaintiff’s motion for reconsideration of the trial court’s summary disposition oral ruling and defendants’ second motion for summary disposition of the breach of contract claims. Once again, plaintiff’s counsel failed to appear at the hearing. The trial court denied plaintiff’s motion for reconsideration. The trial court also granted defendants’ second motion for summary disposition without addressing the merits of the motion.

On March 6, 1998, a hearing was held regarding plaintiff's second motion for reconsideration. At the hearing, the trial court stated that plaintiff's counsel had failed to secure a copy of the transcript regarding the initial summary disposition hearing. Plaintiff's counsel insisted that he had contacted the court reporter and had paid for the transcript. The trial court refused to make inquiry of the court reporter and denied plaintiff's second motion for reconsideration.

As an initial matter, we note that the parties and orders contained within the lower court record indicate that the complaint of plaintiff was disposed of in its entirety. However, that has not proven to be the case. Review of the allegations in the complaint reveal that defendants never moved for summary disposition of two of plaintiff's counts, negligence and negligent infliction of emotional distress allegedly committed by defendants Joy & Greenfield Amoco and Bedoun. Accordingly, irrespective of our conclusion regarding plaintiff's claim of appeal, we must remand for resolution of the outstanding claims.<sup>1</sup>

Addressing the merits of the appeal, plaintiff first argues that the trial court erred in dismissing his ethnic intimidation claim. We agree. Our review of a summary disposition ruling is *de novo*. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). MCL 750.147b; MSA 28.344(2) sets forth the crime of ethnic intimidation as well as provides for a civil action as a result of such intimidation. The statute provides, in relevant part:

(3) Regardless of the existence or outcome of any criminal prosecution, a person who suffers injury to his or her person or damage to his or her property as a result of ethnic intimidation may bring a civil cause of action against the person who commits the offense to secure an injunction, actual damages, including damages for emotional distress, or other appropriate relief. A plaintiff who prevails in a civil action brought pursuant to this section may recover both of the following:

(a) Damages in the amount of 3 times the actual damages described in this subsection or \$2,000.00, whichever is greater.

(b) Reasonable attorney fees and costs.

Statutory interpretation presents a question of law that we review *de novo*. *Entingh v Grooters*, 236 Mich App 458, 460; 600 NW2d 415 (1999). When interpreting a statute, our primary function is to ascertain and give effect to the intent of the Legislature. *Id.* Statutory language is to be given its ordinary and generally accepted meaning. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135-136; 545 NW2d 642 (1996). However, when a statute specifically defines a term, that definition alone must control. *Id.*

Defendants contend plaintiff cannot maintain an action for ethnic intimidation where defendants Joy & Greenfield Amoco and Bedoun cannot be deemed "the person who committed" the alleged offense. We disagree. While the ethnic intimidation statute itself does not define the term "person," the statute is found in the Michigan Penal Code. Provisions under the Penal Code are controlled by MCL

750.10; MSA 28.200. *People v Ghosh*, 188 Mich App 545, 546; 470 NW2d 497 (1991). MCL 750.10; MSA 28.200 provides, in relevant part:

The words “person”, “accused”, and similar words include, unless a contrary intention appears, public and private corporations, copartnerships, and unincorporated or voluntary associations.

There is no indication in the ethnic intimidation statute that a corporation may not be deemed a person for purposes of the statute. Furthermore, the Legislature provided that general rules of construction would be observed in interpreting the statutes of this state. MCL 8.3; MSA 2.212. MCL 8.3l; MSA 2.212(12) defines the term “person” to “extend and be applied to bodies politic and corporate, as well as to individuals.” Accordingly, defendants’ contention, that the individual who committed the crime of ethnic intimidation is solely responsible and a corporate entity may not be responsible for an employee’s actions, is without merit. Cf. *People v General Dynamics Land Systems, Inc*, 175 Mich App 701, 703; 438 NW2d 359 (1989) (a corporation is sufficiently a “person” such that it may be held as the perpetrator of a manslaughter).

Plaintiff also argues that the trial court erred in dismissing his claim of liability based on respondeat superior. We agree. Defendants asserted that any verbal and physical abuse by employees occurred outside the scope of defendants’ employment. Defendants requested summary disposition pursuant to MCR 2.116(C)(10). MCR 2.116(G)(3) provides that a party seeking summary disposition must provide documentary evidence in support. The documentary evidence does not resolve issues of fact, but serves to assist the trial court in determining whether an issue of fact exists. *SSC Associates Limited Partnership v General Retirement System*, 192 Mich App 360, 364; 480 NW2d 275 (1991). After the moving party has moved and supported the dispositive motion, only then must the party opposing the motion come forward with a showing that there is truly a dispute. *Id.*; 2.116(G)(4). In the present case, defendants failed to provide documentary evidence to establish that respondeat superior did not apply because the employees were acting outside the scope of their employment. Accordingly, summary disposition was erroneously granted. Furthermore, we note that even if defendants had presented documentary evidence in support of this claim, the question of whether an act occurs within the scope of one’s employment presents a question of fact for the trier of fact. *Armstead v Jackson*, 121 Mich App 239, 244-245; 328 NW2d 541 (1981). We do not condone the actions of plaintiff’s counsel in failing to appear for the various court hearings. However, the court rules addressing the documentary evidence requirements accompanying a dispositive motion may not be abandoned where other means of penalizing plaintiff’s counsel are available. Accordingly, summary disposition of the respondeat superior count must be reversed.

Lastly, we note that defendants’ brief on appeal and plaintiff’s reply brief address the merits of the dismissal of the breach of contract claims. The propriety of the dismissal of the breach of contract claims is not properly before us because plaintiff failed to include the issue within its statement of questions presented on appeal. *Orion Twp v State Tax Commission*, 195 Mich App 13, 18; 489 NW2d 120 (1992); *CRS, Inc v Michigan National Bank*, 191 Mich App 614, 628; 478 NW2d 893 (1991).

Reversed and remanded for proceedings consistent with the opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Harold Hood

/s/ E. Thomas Fitzgerald

<sup>1</sup> Additionally, defendants Joy & Greenfield Amoco and Bedoun moved for summary disposition of the “assault and battery” claim. However, review of the complaint reveals that there was no individual claim for assault and battery alleged. Rather, allegations of assault and battery occurred within the statement of other claims. It is unclear whether defendants realized this error and began to move for summary disposition of individual paragraphs of the complaint when the second motion for summary disposition was filed.