

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL B. ROSS and LOU ANN ROSS,

Plaintiffs-Appellants,

v

L. B. KNIGHT, INC.,

Defendant-Appellee.

UNPUBLISHED

May 29, 2001

No. 217073

Genesee Circuit Court

LC No. 97-061199-NZ

Before: Neff, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

In this negligence action, plaintiffs appeal by right from a circuit court order granting summary disposition in favor of defendant. We reverse and remand for further proceedings.

Although the trial court did not specify the subsection of MCR 2.116(C) under which it granted defendant's motion for summary disposition, we have reviewed its decision under MCR 2.116(C)(10) because the court considered matters outside the pleadings. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). Our review is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The affidavits, pleadings, depositions, admissions, and other documentary evidence must be considered in a light most favorable to the nonmoving party in determining if a genuine issue of material fact exists for trial. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). When the moving party has properly supported its motion with evidence, the burden shifts to the nonmoving party to show a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If the proffered evidence does not establish a genuine issue on any material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Upon considering the deposition proofs, the affidavit of defendant's president, Thomas Trezek, and the purchase order documentation regarding defendant's contract with General Motors, we conclude that the trial court erred in finding that there was no genuine issue of material fact with respect to the question of whether Kretzschmer may be deemed defendant's employee under the control test for vicarious liability applied in a loaned servant situation. The control test is used in determining if an original master may be held vicariously liable for the tortious acts of a loaned servant. *Hoffman v JDM Associates, Inc*, 213 Mich App 466, 468-469; 540 NW2d 689 (1995); *Hartford Ins Group v Mile High Drilling Co*, 96 Mich App 455, 458,

460-461; 292 NW2d 232 (1980). Vicarious liability has not been found where the original master did not exercise or possess the right to control detailed activities of the loaned servant. *Hoffman, supra* at 473. The control test has been described by our Supreme Court as follows:

The test is whether in the particular service which he is engaged or requested to perform[,] he continues liable to the direction and control of his original master or becomes subject to that of the person to whom he is lent or hired, or who requests his services. It is not so much the actual exercise of control which is regarded, as the right to exercise such control. To escape liability[,] the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under control of a third person. Subject to these rules[,] the original master is not liable for injuries resulting from acts of the servant while under the control of a third person. [*Janik v Ford Motor Co*, 180 Mich 557, 562; 147 NW 510 (1914), quoting 26 Cyc, p 1522.]

In the case at bar, there was evidence that the relationship between defendant and General Motors went beyond a typical labor broker situation. In the typical labor broker situation, customers call in employment needs for a broker to fill. *Farrell v Dearborn Mfg Co*, 416 Mich 267, 275; 330 NW2d 397 (1982). After arriving at the place of business, the worker is subject to the control and authority of the customer. *Id.* By contrast, in the case at bar, the purchase order documentation filed by defendant with its motion indicates that defendant embarked on more than filling temporary employment needs. On its face, the documentation demonstrates that defendant undertook a coordination of housekeeping services to reduce costs and improve performance. Defendant was to perform the following specified services according to SECTION 1 of the "contract for services":

- a. Provide three full-time supervisors
- b. Provide a full-time Coordinator
- c. Make job assignments
- d. Maintain supplies
- e. Reduce costs
- f. Handle discipline
- g. Adhere to GMP-FC's safety programs and procedures
- h. Supervise the training of all designated cleaning employees
- i. Continually improve the quality of housekeeping activities in the plant
- j. Handle all union contractual issues
- k. Comply with OSHA and other applicable Federal, State, and local codes and regulatory agencies
- l. Follow GMP-FC's maintenance program of cleaning equipment
- m. Manage the overtime and shift preference agreement for all cleaning employees

Further, among the basic conditions for supervision that defendant was required to provide in order to fulfill its project goals as specified in SECTION 2(a) of the contract is a hierarchy consisting of supervisors, a coordinator and, ultimately, a project officer:

KFM [defendant] shall provide one supervisor on day shift and one on third shift to be responsible for the day to day operations of the GMP-FC's [General Motors Powertrain, Flint Components Plant's] cleaning and housekeeping employees. A project coordinator will be responsible for the proper communications between KFM assigned supervision and a designated GMP-FC representative. A project officer will ensure commitment and assistance for the total project by KFM.

We note that defendant's president, Thomas Trezek, looked to these and other provisions of defendant's contract with General Motors to conclude that defendant did not control the coordinator, Mark Yohannan, or supervisor, Kevin Kretzschmer, who committed the alleged negligent act of ordering plaintiff Michael Ross, a union employee, to perform work beyond his medical restrictions. However, opinions in affidavits do not establish disputed facts or the lack of them. *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Further, when reviewing a motion for summary disposition, a court will only determine the meaning of a contract when its terms are unambiguous. *Id.* at 363. The meaning of a clear and unambiguous contract is a question of law. *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 714; 580 NW2d 8 (1998). If the terms of a contract are subject to two or more reasonable interpretations, factual development is necessary to determine the parties' intent and summary disposition is inappropriate. *SSC Associates Ltd Partnership, supra*.

We conclude that the contract language itself, and not the conclusions Trezek drew from the contract language, is the relevant consideration in determining if a genuine issue of a material fact was shown with regard to whether defendant resigned full control of Kretzschmer to General Motors relative to the detailed supervisory activities that he was to perform. We further hold that the contract language itself clearly reflects that defendant, in addition to providing "supervisors" and a "coordinator," was itself obligated by the contract to perform services (e.g., adhering to General Motors' safety programs and handling union contract issues).

Although it is reasonable to infer that the supervisors and coordinator would be the individuals to deal directly with safety and union issues in their daily work activities, and the deposition proofs showed that these individuals dealt with these issues, responsibility for adhering to General Motors' safety programs and handling union issues rested with defendant under the clear language of the contract. Considered in light of the evidence of the chain of command afforded defendant by virtue of SECTION 2(a) of its contract with General Motors, to fulfill its responsibilities, we conclude that a genuine issue of material fact exists with regard to whether defendant resigned full control over Kretzschmer relative to the specific work activity underlying plaintiffs' negligence action. Hence, the trial court erred in granting summary disposition in favor of defendant.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey