

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ROBERT R. PEARSON, JR. and	:	
BOBBIE JO PERSON,	:	C.A. No. 02C-09-028 WLW
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
PHILIP E. THOMAS, J&J BUS	:	
SERVICE, INC., a Delaware	:	
corporation, and HILTON BUS	:	
SERVICE, INC., a Delaware,	:	
corporation,	:	
	:	
Defendants.	:	

Submitted: June 3, 2005

Decided: July 5, 2005

**OPINION AND ORDER**

Upon Defendants' Motion for Summary Judgment.  
Granted in part; Denied in part.

I. Barry Guerke, Esquire, Parkowski Guerke & Swayze, P.A., Dover, Delaware;  
attorneys for the Plaintiffs.

James J. Woods, Jr., Esquire, Sullivan & Woods, LLC, Wilmington, Delaware;  
attorneys for the Defendants.

WITHAM, R.J.

Upon consideration of Defendants' motion for summary judgment and the record before this Court, it appears to the Court:

This is a personal injury case arising from a hit and run collision that occurred between a school bus and a motorcycle on October 3, 2000. Robert R. Pearson, Jr. ("Plaintiff") alleges that he was operating a motorcycle when he was struck by a school bus operated by Philip E. Thomas ("Thomas"), who failed to adhere to the stop sign posted at the intersection.<sup>1</sup> The complaint further alleges that Thomas was acting as the servant, agent and employee of J & J Bus Service, Inc. and/or Hilton Bus Service, Inc. at the time of the collision.<sup>2</sup>

Defendants have filed a motion for summary judgment contending that insufficient evidence exists establishing a connection between the collision and the school bus operated by Thomas.<sup>3</sup> Defendant J & J Bus Service further contends that summary judgment is appropriate because Thomas was an agent and/or temporary employee of Hilton Bus Service at the time of the alleged incident. Hilton Bus Service also contends that summary judgment is warranted because any action against Hilton Bus Service is barred by the applicable two-year statute of limitations.

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<sup>1</sup> Bobbie Jo Pearson has also asserted a claim for loss of consortium.

<sup>2</sup> The initial complaint against Defendants Philip Thomas and J & J Bus Service was filed on September 18, 2002. Hilton Bus Service was added to this litigation on August 25, 2003.

<sup>3</sup> This Court was informed during the pretrial conference that Defendant Thomas is now deceased and a substitution of party is necessary.

*Standard of Review*

Superior Court Civil Rule 56(c) provides that judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>4</sup> On a motion for summary judgment the Court examines the record to determine whether any material issues of fact exist. Summary judgment will only be granted when, after viewing the record in a light most favorable to the non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.<sup>5</sup> Summary judgment will not be granted when a more thorough inquiry into the facts is desirable to clarify the application of the law to the circumstances.<sup>6</sup>

*Defendants’ Motion for Summary Judgment based upon Insufficient Evidence*

Defendants contend that summary judgment is warranted because insufficient evidence exists establishing a connection between the collision and the school bus operated by Thomas alleged to be involved. Defendants argue that many school buses identical to the bus operated by Thomas travel through that intersection each afternoon. Defendants further contend that none of the adult witnesses can

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<sup>4</sup> Super. Ct. Civ. R. 56.

<sup>5</sup> *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973); *see also McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del. 1994).

<sup>6</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

affirmatively identify the bus and to the extent that statements of children exist exclaiming that Thomas was the driver involved in the accident, Defendants contend that such statements are hearsay and inadmissible.

Plaintiffs have deposed Ashley Walker and Antoinette Walker since this motion for summary judgment was filed.<sup>7</sup> Ashley Walker has stated that she was dropped off by the school bus operated by Thomas and observed that same bus hit the motorcycle. The deposition of Antoinette Walker, who assisted Plaintiff immediately after the collision, corroborates the statements of her daughter and further connects Defendants' bus and route to the collision. Viewing the evidence in a light most favorable to the Plaintiffs, the testimony of Ashley and Antoinette Walker along with the time and place of the collision establishes a sufficient connection between the collision and Defendants' school bus creating a genuine issue of material fact. Accordingly, Defendants' motion for summary judgment based upon an insufficient connection between the collision and their school bus is hereby *denied*.

*Defendant J & J Bus Service's Motion for Summary Judgment*

Defendant J & J Bus Service has filed a motion for summary judgment contending that Thomas and a J & J bus were loaned to Hilton Bus Service at the time of the collision. J & J Bus Service contends Hilton Bus Service paid Thomas' wages for that run and had the right to control his actions. Accordingly, J & J Bus Service contends that it is not liable for the negligent actions of Thomas during that route

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<sup>7</sup> There was apparent difficulty locating these witnesses as Ashley Walker was believed to have been an adult.

because Thomas was temporarily a Hilton Bus employee.

Plaintiffs contend vicarious liability is not an either/or proposition and assert that both Hilton Bus Service and J & J Bus Service may be liable under the principle of duality of employment. Moreover, Plaintiffs contend the common law borrowed servant doctrine requires resolution of factual issues specific to each case and such factual determinations must be left to the jury.

An employee permitted by his employer to perform services for another may become an employee to the other for those limited services.<sup>8</sup> The Delaware Supreme Court in *Richardson v. John T. Hardy & Sons, Inc.*<sup>9</sup> stated:

The general rule is that an employee, with his consent, may be loaned by his general employer to another to perform specific services, and that, in the course of and for the purpose of performing such services, he may become the employee of the specific employer rather than the employee of the general employer. Accordingly, a loaned employee may become a specific employer's employee while at the same time remaining, generally speaking, the employee of him who loans his services.<sup>10</sup>

The determinative factor is whether the employee was acting for or under the direction of the general employer or the specific employer when the alleged negligent action occurred.<sup>11</sup> Thomas, upon completion of his duties for J & J Bus Service and

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<sup>8</sup> See Restatement (Second) of Agency § 227 (1958).

<sup>9</sup> 182 A.2d 901 (Del. 1962).

<sup>10</sup> *Id.* at 902.

<sup>11</sup> *Id.* at 903.

while still in possession of a J & J bus, was performing a bus route for Hilton Bus Service when this alleged collision occurred. Although J & J Bus Service approved the use of Thomas and the bus for this additional route, J & J Bus Service neither received compensation nor compensated Thomas for such route. Thomas was paid directly by Hilton Bus Service for that particular route.

Even viewing the evidence and all reasonable inferences therefrom in a light most favorable to Plaintiffs, the only reasonable conclusion is that Thomas was an employee of Hilton Bus Service at the time of the alleged collision. Thomas was under the control of and acting on behalf of Hilton Bus Service as operator of the bus for that particular route. There is no evidence suggesting that J & J Bus Service retained any control over Thomas. The mere fact that J & J Bus Service owned the bus alleged to be involved is insufficient to establish an agency relationship.<sup>12</sup> The fact that J & J approved the arrangement and gratuitously provided the bus also does not evidence retention of control. Because J & J Bus Services had no control over Thomas when the alleged collision occurred and because Thomas was not acting on behalf of or under the direction of J & J Bus Service when the alleged collision occurred, any negligent action by Thomas on that particular route cannot be imputed onto J & J Bus Service. Accordingly, Defendant J & J Bus Service's motion for summary judgment is hereby *granted*.

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<sup>12</sup> *Finkbiner v. Mullin*, 532 A.2d 609, 615 (Del. Super. Ct. 1987).

*Defendant Hilton Bus Service's Motion for Summary Judgment*

Hilton Bus Service contends that any action against it is time barred by the two-year statute of limitations. Hilton Bus Service was not added as a party until August 25, 2003, almost 3 years after the collision occurred and contends that the amended complaint cannot relate back to the date of the original complaint under Superior Court Civil Rule 15(c)(3) because no evidence exists indicating that Hilton Bus Service had any notice of this action within the requisite time period.

Superior Court Civil Rule 15 (c) permits an amendment to relate back to the date of the original pleading if: (1) the basic claim arose out of the same conduct set forth in the original pleading; (2) the party to be brought into the action received such notice that it would not be prejudiced in maintaining its defense; (3) the party knew or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements were fulfilled within the prescribed limitations period.<sup>13</sup> Although this Court has broad discretion in granting motions to amend, each requirement mandated by Superior Court Civil 15 (c)(3) must be satisfied for relation back to occur.<sup>14</sup>

In the case *sub judice*, the amended complaint is based upon the same conduct alleged in the original complaint. The amended complaint merely includes Hilton Bus Service as an additional defendant vicariously liable for any negligent conduct

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<sup>13</sup> *Marro v. Gopez*, 1993 WL 138997, at \*2 (Del. Super.); *see also Mergenthaler, Inc. v. Jefferson*, 332 A.2d 396, 397 (Del. 1975).

<sup>14</sup> *Taylor v. Champion*, 693 A.2d 1072 (Del. 1997).

of Thomas. J & J Bus Service was initially named as a defendant under the doctrine of respondeat superior because it was a J & J bus alleged to be involved in the collision. However, it was later determined that the bus and operator alleged to be involved in the collision was borrowed from J & J Bus Service by Hilton Bus Service to cover its route. Hilton Bus Service was notified that a collision had occurred and was aware that the bus used for its route might have been the bus involved. Because Hilton Bus Service was utilizing a J & J bus in performing its route when the collision occurred, Hilton Bus Service should have known that, but for mistake in identity, the action would have been brought against it.

Although Hilton Bus Service was notified that a collision occurred, the pivotal issue for allowing an amended complaint to relate back to the date of the original complaint is whether Hilton Bus Service received notice of this action within the prescribed time period. Hilton Bus Service contends no evidence exists establishing that it received notice of this action prior to January 16, 2003. Plaintiffs argue that Hilton Bus Service received sufficient notice on September 30, 2002. On this date, Deborah K. Herrmann, vice-president of Hilton Bus Service, accepted service of the complaint on behalf of J & J Bus Service.<sup>15</sup> Hilton Bus Service has submitted an affidavit by Deborah K. Herrmann acknowledging that she signed for the papers on behalf of James Spencer but was unaware of the contents of said papers. Ms. Herrmann contends that it was not uncommon to sign papers for parts or orders on

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<sup>15</sup> James Albert Spencer, owner-operator and President of J & J Bus Service, is also the head mechanic for Hilton Bus Service.



behalf of Mr. Spencer. Ms. Herrmann has stated that she placed the papers on Mr. Spencer's toolbox without inquiring into their contents and was unaware of any lawsuit until Hilton Bus Service was officially named as an additional defendant.

The purpose of Superior Court Civil Rule 15 (c) is to prevent the harsh consequences from the strict application of the statute of limitations when the correct party had sufficient notice of the institution of an action. Notice is liberally construed and not confined to service of process. It can be actual or constructive. The test is whether the party to be added had *adequate* notice within the prescribed time period.<sup>16</sup>

This Court finds that Hilton Bus Service was adequately notified of the pending litigation within the prescribed time period. Ms. Herrmann accepted service on behalf of Mr. Spencer for this pending litigation on September 30, 2002. Although Ms. Herrmann has stated she was unaware of the this action until Hilton Bus Service was added as a defendant, this Court is mindful that Ms. Herrmann is not a disinterested party in these proceedings.<sup>17</sup> This Court is unpersuaded that a vice-president would not distinguish accepting service for legal papers on behalf of someone from accepting orders for parts. Considering the unique relationship between Hilton Bus Service and J & J Bus service, the circumstances under which this collision is alleged to have occurred and the manner in which service was

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<sup>16</sup> See *Seth v. Sprueken*, 328 A.2d 143, 145 (Del. Super. Ct. 1974).

<sup>17</sup> Ms. Herrmann is now President of Hilton Bus Service.

*Pearson v. Thomas, et al.*  
C.A. No. 02C-09-028 WLW  
July 5, 2005

performed on J & J Bus Service through Hilton Bus Service, this Court is unpersuaded that Hilton Bus Service was unaware of any litigation until it was finally added as a party in August of 2003. This Court is satisfied that Hilton Bus Service was provided with adequate notice of the legal proceedings on or about September 30, 2002 when Ms. Herrmann accepted service on behalf of Mr. Spencer.

Based upon the aforementioned reasons, the requirements of Rule 15 (c)(3) have been satisfied and the amended complaint may relate back to the date of the original filing. Therefore, Plaintiffs' action complies with the statute of limitations and Defendant Hilton Bus Service's motion to dismiss based upon the statute of limitations is hereby *denied*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.  
Resident Judge

WLW/dmh  
oc: Prothonotary  
xc: Order Distribution  
File