

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDREA L. MOORE, a minor,	§	
By Her Next Friend, JUDITH A.	§	No. 626, 2006
MOORE, and the ESTATE OF	§	
EDWARD V. MURPHY, by its	§	
Personal Representative, PATRICIA	§	
BOESENBERG,	§	
	§	
Plaintiffs Below,	§	
Appellants,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for Kent County
	§	
GARY E. EMEIGH and TOD H.	§	
EMEIGH,	§	
	§	
Defendants Below,	§	C.A. No. 05C-03-029
Appellees.	§	

Submitted: July 25, 2007

Decided: October 1, 2007

Before **HOLLAND, BERGER, JACOBS** and **RIDGELY**, Justices and **NOBLE**,  
Vice Chancellor,<sup>1</sup> constituting the Court *en Banc*.

**ORDER**

This 1<sup>st</sup> day of October, on consideration of the briefs and arguments of the parties, it appears to the Court that:

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<sup>1</sup>Sitting by designation pursuant to Art. IV § 12 of the Delaware Constitution and Supreme Court Rules 2 and 4.

1) The Estate of Edward V. Murphy and members of Murphy's family (collectively, "the Estate") appeal from the trial court's grant of summary judgment in a personal injury action against the owner and pilot of an airplane that caused Murphy's death. The Estate argues that there are disputed issues of fact as to whether the pilot, Gary Emeigh ("Emeigh"), was acting within the course of employment at the time of the accident. In addition, the Estate argues that the trial court erred in holding that its amended claim against the owner of the plane, Tod Emeigh ("Tod"), is time barred, because the amended claim is subject to the "relation back" provision of Superior Court Rule 15(c)(2).

2) Murphy and Emeigh both worked for The News Journal Co. – Murphy as a sports writer and Emeigh as a photographer. They were assigned to cover a basketball tournament in Richmond, Virginia during the week of March 10, 2003. On March 12, 2003, the two traveled to Richmond by car and returned home the same day. They decided that it would be more convenient to fly to the next round of the competition. Emeigh is a licensed pilot and his cousin, Tod, agreed to lend Emeigh his plane. On March 14, 2003, Murphy and Emeigh flew to Richmond. They had planned to stay overnight, but Murphy asked Emeigh to fly them home after the game. Both men were in the plane, with the engine running, when Emeigh noticed that a wheel chock had not been removed from the pilot side wheel Emeigh instructed

Murphy to remove the chock. In the process of attempting to do so, Murphy walked or fell into the propeller and was killed.

3) The Estate filed suit against Emeigh and Tod in March 2005. The complaint alleges, in Count I, that Emeigh was negligent in numerous respects, including his failure to turn off the engine before sending Murphy out to remove the chock. Count II of the complaint alleges that Tod is the owner of the plane; that Tod gave Emeigh permission to use the plane; and that Tod is vicariously liable for the damages caused by his agent, Emeigh. After discovery, Emeigh and Tod filed a motion for summary judgment. For the first time in its opposition to that motion, the Estate argued that Tod was negligent for failing to ensure that the plane was airworthy before allowing Emeigh to borrow it. The Superior Court granted summary judgment and this appeal followed.

4) The first issue is whether the Workers' Compensation Act bars the Estate's claims against Emeigh. Generally, Workers Compensation is an employee's exclusive remedy against his employer for injuries sustained "in the course of employment ...."<sup>2</sup> Claims against third party tortfeasors are permitted, as long as the third party is not a person "in the same employ" as the injured employee.<sup>3</sup> One is in

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<sup>2</sup>19 *Del.C.* § 2304.

<sup>3</sup> 19 *Del. C.* § 2363(a).

the same employ if he is employed by the same employer and acting in the course of his employment at the time of the accident.<sup>4</sup> Finally, to be acting in the course of one's employment,

the defendant need not have been engaged in a regular duty or function of his own employment at the time of injury to the plaintiff.... [T]he defendant [is immune from suit] if the act complained of was one which the defendant might reasonably do, or be expected to do, within a time during which he was employed and at a place where he could reasonably be during that time - even though outside his regular duties.<sup>5</sup>

5) It is undisputed that Murphy and Emeigh were employed by the same company and were assigned by their employer to travel to Virginia and cover the basketball tournament. The sole question, for present purposes, is whether Emeigh was acting within the course of his employment when he undertook the job of piloting a small plane to transport himself and Murphy to and from their assigned destination. According to Emeigh, the record establishes that: 1) The News Journal did not object to the use of private planes for travel to assignments; 2) Emeigh piloted planes to other assignments; 3) The News Journal reimbursed Emeigh for his expenses in piloting those planes; and 4) The News Journal considered Emeigh to be working from the time he left Delaware until the time he returned.

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<sup>4</sup>*Groves v. Marvel*, 213 A.2d 853, 855 (Del. 1965).

<sup>5</sup>*Id.* at 856.

6) The record is not as clear as Emeigh suggests. First, Emeigh testified at his deposition that he “used” an airplane on prior occasions to carry out his job activities. He did not testify that he piloted an airplane on those other occasions. Moreover, Emeigh testified that: 1) he did not ask permission to pilot a plane to Virginia for the trip in question; 2) he did not submit an expense report seeking reimbursement for this trip; 3) he and Murphy had traveled together on 100 other assignments and had never flown by private plane; and 4) he has never been paid by The News Journal for piloting a plane. Notably, there is no evidence from The News Journal as to its policies concerning mode of travel, in general, or the use of private planes, in particular.

7) We conclude that the present record is not sufficiently well developed to support a determination that Emeigh was acting within the course of his employment when he was piloting the plane.<sup>6</sup> Accordingly, we reverse the trial court’s grant of summary judgment to Emeigh.

8) The second issue is whether the trial court erred in holding that the Estate’s new claim against Tod is barred by the statute of limitations. The Estate first presented its direct negligence claim against Tod in its opposition to Tod’s motion for summary judgment. Since the two year statute of limitations had long since expired,

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

the question for the trial court was whether this new claim, if properly presented,<sup>7</sup> would relate back to the date that the complaint was filed. Under Superior Court Rule 15(c)(2), an amended claim relates back if it arises “out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading ....” The original claim alleged that Tod was vicariously liable for Emeigh’s negligence. The new claim alleges that Tod negligently failed to inspect the plane before he allowed Emeigh to borrow it. The new claim presents an independent theory of liability based on independent facts that were not set forth in the original complaint. Accordingly, the trial court acted well within its discretion in holding that the new claim does not relate back.<sup>8</sup>

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED in part and REVERSED in part, and this matter is REMANDED for further action in accordance with this decision. Jurisdiction is not retained.

BY THE COURT:

/s/ Carolyn Berger  
Justice

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<sup>7</sup>The Estate never filed a motion to amend its complaint.

<sup>8</sup>*Mergenthaler, Inc. v. Jefferson*, 332 A.2d 396 (Del. 1975).