STATE OF MICHIGAN

COURT OF APPEALS

MARK BOGGS,

Plaintiff-Appellant,

v

SCOTT GATES,

Defendant-Appellee.

UNPUBLISHED
July 28, 2000

No. 220995
Kent Circuit Court
LC No. 96-011294-NO

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order of summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

This case arises out of an injury suffered by plaintiff while he was working as a supervising machinist at Quality Die and Mold Corporation. Defendant was the plant superintendent and plaintiff's supervisor at Quality Die when plaintiff was injured. In December 1994, a spindle speeder was not working properly on the steel milling machine that plaintiff was operating. Plaintiff removed the spindle speeder and gave it to defendant for repair. Ultimately, defendant took the part home to fix it and returned it to plaintiff the following day. When plaintiff installed the spindle speeder, he heard a rattling noise and leaned closer to the machine to detect the cause of the noise. Plaintiff was then struck in the right eye by a rod that had bent outward and he lost eighty-five percent of the vision in that eye. Plaintiff did receive a lump sum worker's compensation payment of $80,000 because of the injury he suffered on the job.

Plaintiff filed suit against defendant in October 1996, alleging that defendant negligently attempted to repair the spindle speeder.[1] Defendant later moved for summary disposition under § 131 and § 827 of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.;* MSA

[1] We note that the appeal involving the declaratory judgment action regarding defendant's homeowner's insurer, and whether the insurer has a duty to defend and indemnify in this action, is also being decided by this panel today. See *State Farm Fire and Casualty Co v Boggs*, unpublished opinion per curiam of the Court of Appeals, issued __/__/2000 (Docket No. 218886).

17.237(101) *et seq.*, contending that plaintiff's exclusive remedy was worker's compensation because plaintiff's complaint sounded only in negligence against a coemployee. The trial court granted defendant' motion for summary disposition, ruling that defendant was a coemployee and that there was no evidence that defendant was an independent contractor nor acting outside the scope of his employment when he attempted to fix the machine part at home.

Plaintiff argues that the trial court improperly granted summary disposition in favor of defendant because he and defendant were not coemployees for the purposes of § 131 and § 827 of the WDCA. We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. The court must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial. *Spiek, supra*, p 337.

MCL 418.827(1); MSA 17.237(827) provides in relevant part:

> Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his or her dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with this section.

As stated in *Jones v General Motors Corp*, 136 Mich App 251, 257-258; 355 NW2d 646 (1984), "[t]he exclusive remedy and coemployee provisions bar a suit against an employer for the negligence of a coemployee acting within the scope of employment." Plaintiff, however, contends that he is not barred from suing defendant because defendant was not acting as a fellow employee of Quality Die when he took the spindle speeder home to repair it. It is plaintiff's contention that defendant was acting as an independent contractor when he repaired the spindle speeder at home and that he was acting outside the scope of his employment duties when he did so.

First, we agree with the trial court that there was no evidence that defendant was an independent contractor. Gates had worked for Quality Die for approximately nineteen years: first as a machinist, then as head of maintenance, then as head of the duplicating department, and finally as plant superintendent. Jack Boudrie, who was the sole owner and president of Quality Die at the time of plaintiff's injury, testified at his deposition that defendant was a salaried employee when he repaired the spindle speeder and Boudrie hired defendant to be the plant superintendent. Boudrie also testified that, to the best of his knowledge, defendant was never given separate or additional compensation for fixing machine parts after normal business hours. Gates also testified that he did not bill Quality Die separately for repairing the spindle speeder.

Plaintiff has presented no evidence that defendant was an independent contractor when he repaired the spindle speeder at his home. See *Nichol v Billot*, 406 Mich 284, 293-297; 279 NW2d

761 (1979). Thus, the trial court correctly found that plaintiff failed to present any evidence raising a genuine issue of material fact with regard to whether defendant was acting as an independent contractor.

Plaintiff also contends that he and defendant were not coemployees because defendant was acting outside the scope of his employment when he repaired the spindle speeder at his home. However, the record evidence supports the trial court's finding that defendant's actions were within the scope of his employment. Defendant testified that before he became plant superintendent, he held the position of head of maintenance at Quality Die. Further, defendant testified that as plant superintendent, he continued to make minor repairs to machines. Boudrie testified that given defendant's experience and training in machine maintenance, he was not surprised that defendant took the spindle speeder home to repair it, and that it was within his discretion as plant superintendent to do so. Boudrie also testified that it was defendant's job to do whatever was necessary to "make sure that the plant kept running, and that the equipment . . . kept running also." The mere fact that defendant took the spindle speeder home to repair it does not take the action outside of defendant's scope of employment. See *Fidelity & Casualty Co of New York v DeShone*, 384 Mich 686, 692; 187 NW2d 215 (1971) (to be in the course of employment, employees are not required to do only those acts that are part of their assigned work).

Plaintiff presented no evidence sufficient to raise a genuine issue of material fact about whether defendant was acting within the scope of his employment when he took the spindle speeder home to repair it. Therefore, the trial court did not err in finding that there was no factual dispute regarding whether defendant was acting within the scope of his employment because the evidence shows that he was acting within the scope of his employment.

Affirmed.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck