STATE OF MICHIGAN

COURT OF APPEALS

JANET R. HOOL, Personal Representative of the Estate of GARY E. HOOL, Deceased,

Plaintiff-Appellant,

v

WILLIAM A. KIBBE & ASSOCIATES, INC.,

Defendant/Third-Party Plaintiff-Appellee,

and

DARWIN EAGLE,

Defendant-Appellee,

and

GENERAL MOTORS CORPORATION,

Third-Party Defendant.

UNPUBLISHED
November 22, 2005

No. 255371
Saginaw Circuit Court
LC No. 02-042609-NO

JANET R. HOOL, Personal Representative of the Estate of GARY E. HOOL, Deceased,

Plaintiff,

v

WILLIAM A. KIBBE &ASSOCIATES, INC.,

Defendant/Third-Party Plaintiff-Appellee,

and

DARWIN EAGLE,

No. 255390
Saginaw Circuit Court
LC No. 02-042609-NO

Defendant,

and

GENERAL MOTORS CORPORATION,

Third-Party Defendant-Appellant.

Before: Donofrio, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Plaintiff Janet Hool, as Personal Representative of the Estate of Gary Hool, deceased (Hool), and third-party defendant General Motors Corporation (GM), appeal as of right the trial court's opinion and order granting summary disposition in favor of defendant Darwin Eagle and defendant/third-party plaintiff William A. Kibbe & Associates, Inc. (Kibbe). We affirm in part, reverse in part, and remand.

On January 25, 2001, GM employed Hool at its Saginaw Metal Casting plant. On that day, Eagle, a contract supervisor filling in for Hool's regular supervisor, directed Hool and two other employees to conduct a tear-out of the refractory brick in a furnace at the plant. As Hool and his coworkers removed the brick, it suddenly gave way and collapsed, injuring one of the coworkers and killing Hool.

Eagle was working as a contract supervisor at the GM plant under an agreement between Kibbe and GM. The agreement required Kibbe to provide GM with contract supervisors to support its operations. GM employed Eagle for approximately twenty-seven years before his retirement in 1994. According to Eagle, after his retirement in 1994, he learned GM was interested in having him return to work as a contract supervisor, and he was instructed to contact Kibbe. Eagle stated that after executing the contract with Kibbe, he had no further personal contact with Kibbe, except for sending in his hours. GM assigned all of Eagle's work.

Following the incident, plaintiff filed suit against Kibbe alleging both direct negligence and vicarious liability for Eagle's conduct. Eagle was later added as a defendant. Eagle filed a motion for summary disposition pursuant to both MCR 2.116(C)(7) and (10), arguing that GM was his employer at the time of the accident under the economic realities test and thus as Hool's coemployee he was protected under the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. Kibbe joined Eagle's motion. Plaintiff opposed defendants' motions asserting that Eagle was not GM's employee under the economic realities test. Plaintiff also argued in the alternative, that if the court did not agree that Eagle was Kibbe's employee as a matter of law, the facts surrounding Eagle's employment status create a fact question for the jury. Plaintiff also filed a cross-motion for summary disposition under MCR 2.116(I)(2) asserting that the facts of Eagle's employment were not reasonably in dispute and show Eagle was an employee of Kibbe, not GM.

Kibbe filed a third-party complaint against GM claiming that based on the agreement between Kibbe and GM for Eagle's services, Kibbe was entitled to both express and common-law indemnification regarding any liability arising from Hool's death. These parties then filed cross-motions for summary disposition. Kibbe argued that GM was required to indemnify it for Hool's claims because GM's acts or omissions caused Hool's death and GM failed to properly train Eagle in violation of the agreement. GM responded arguing that because Eagle was not GM's employee under the terms of the agreement, Eagle's actions could not create any liability on the part of GM.

After entertaining oral argument, the trial court granted Eagle's motion for summary disposition under MCR 2.116(C)(7), finding that Eagle was an employee of GM under the economic realities test, and therefore, the exclusive remedy provision of the WDCA barred plaintiff's claims against Eagle as Hool's coemployee. The court also granted Kibbe's motion for summary disposition against plaintiff under MCR 2.116(I)(2), concluding that because Kibbe did not retain any control over Eagle while he worked at GM, Kibbe was not vicariously liable for Eagle's negligence. Regarding the third-party complaint, the court granted Kibbe's motion for summary disposition under MCR 2.116(C)(10) based on its finding that the indemnity clause was clear and unambiguous and required GM to indemnify Kibbe for its acts or omissions or its failure to comply with the terms of the contract. Because the trial court found that the acts or omissions of an employee of GM contributed to Hool's death and that GM failed to comply with the terms of the contract requiring it to properly train Eagle, the trial court concluded summary disposition in Kibbe's favor was proper.

First, plaintiff and GM assert that the trial court erred in finding that GM employed Eagle and argue that instead, Kibbe employed Eagle. They also argue alternatively that if this Court does not conclude that Kibbe employed Eagle as a matter of law, then, at minimum, there were issues of fact regarding Eagle's employment status that precluded summary disposition. We review a trial court's decision on a motion for summary disposition de novo. *Rinas v Mercier*, 259 Mich App 63, 67; 672 NW2d 542 (2003). When reviewing a motion for summary disposition brought under MCR 2.116(C)(7), this Court considers affidavits, depositions, admissions, and any other documentary evidence, as long as these materials would be admissible at trial. *Pasakulich v Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). Further, we accept the contents of the complaint as true unless the moving party contradicts the plaintiff's allegations with documentary evidence. *Id*.

According to the WDCA, the right to recover benefits under the Act is the employee's exclusive remedy against the employer for a personal injury or occupational disease arising out of or in the course of employment, unless there is an intentional tort. MCL 418.131(1); *Harris v Vernier*, 242 Mich App 306, 310; 617 NW2d 764 (2000). The Act also precludes suit against a negligent coemployee. MCL 418.827(1); *Wahley v McClain*, 158 Mich App 533, 535; 405 NW2d 187 (1987). Eagle asserts that because he was GM's employee at the time of the accident, he was Hool's coemployee and is entitled to protection under the exclusive remedy provision of the Act.

To determine who employed Eagle, for purposes of the WDCA, we apply the "economic reality test," also known as the economic realities test. *Oxley v Dep't of Military Affairs*, 460 Mich 536, 549; 597 NW2d 90 (1999). The economic realities test is "'not a matter of terminology, oral or written, but of the realities of the work performed.'" *Nichol v Billot*, 406

Mich 284, 294; 279 NW2d 761 (1979), quoting *Schulte v American Box Board Co*, 358 Mich 21, 33; 99 NW2d 367 (1959). It has four factors: (1) control of the worker's duties; (2) payment of wages; (3) the right to hire, fire, and discipline; and (4) the performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal. *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 688; 594 NW2d 447 (1999). However, no single factor is controlling. *Id*. at 689. Rather, the court must examine the totality of the circumstances. *Id*. at 688. Further, whether a business entity is an employer under the WDCA "is a question of law for the courts to decide if the evidence on the matter is reasonably susceptible of but a single inference." *Id*. at 693-694. "Only where evidence of a putative employer's status is disputed, or where conflicting inferences may reasonably be drawn from the known facts, is the issue one for the trier of fact to decide. *Id*. at 694.

Applying the economic realities test, we conclude that the trial court did not err in finding GM employed Eagle. First, GM controlled Eagle's duties. Although plaintiff argues GM only assigned Eagle general tasks, after reviewing the record, it is clear from both Eagle's and his supervisor's testimony that GM controlled Eagle's day-to-day activities. In fact, the only contact Eagle had with Kibbe after signing the contract was when he submitted time sheets for payment. Second, GM can be attributed with payment of Eagle's wages because although Kibbe directly paid Eagle, Kibbe invoiced GM for Eagle's hours and GM reimbursed Kibbe. So, in reality, GM paid Eagle. See *Tolbert v US Truck Co*, 179 Mich App 471, 476; 446 NW2d 484 (1989). Next, the record reveals that GM had the right to hire, fire, and discipline Eagle, within the meaning of the economic realities test. Although admittedly, GM could not terminate Eagle's employment with Kibbe, and Kibbe was responsible for disciplinary action, Eagle's GM supervisor had the ability to remove Eagle from the job site. See *Chiles v Machine Shop, Inc*, 238 Mich App 462, 467-468; 606 NW2d 398 (1999). Finally, record evidence establishes that Eagle performed duties integral to GM's business, and contributed to the accomplishment of a common goal. Eagle supervised GM workers in their day-to-day operations at the plant. He filled in for supervisors and worked on routine activities in the melting and maintenance department. The relationship between Kibbe and GM was sufficient to establish a common objective or business effort between the parties. See *Tolbert*, *supra* at 476 (holding that a labor broker relationship "established a common objective in a business effort"). Because the factors weigh in favor of the conclusion that GM employed Eagle, the trial court properly granted Eagle's motion for summary disposition.

In order to determine whether Kibbe employed Eagle and, thus, was vicariously liable for Eagle's negligence, we apply the "control test." *Ashker v Ford Motor Co*, 245 Mich App 9, 14-15; 627 NW2d (2001). The doctrine of vicarious liability, also known as *respondeat superior* stands for the proposition that, "'a master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment."' *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002), quoting *Murphy v Kuhartz*, 244 Mich 54, 56; 221 NW 143 (1928). "[T]he purpose of the control test is to define and delimit the circumstances under which a master should be held liable for the acts committed by a servant which injure a third party." *Nichol*, *supra* at 296. It is also used to determine when, because of the employer's exercise of a degree of control inconsistent with independent contractor status, the independent contractor becomes an employee for purposes of respondeat superior liability. *Id*. An independent contractor is defined as "one who, carrying on an independent business, contracts to do work without being subject to the right of control by the employer as to the

method of work but only as to the result to be accomplished." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 553-554; 487 NW2d 499 (1992) quoting *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 622-623; 335 NW2d 106 (1983).

> 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 NW2d 510 (1914), quoting 26 Cyc p 1522.]

Thus, when an employer does not retain or exercise any day-to-day control or supervision over its employee's work activities, it is not liable under a theory of respondeat superior for the employee's negligence. *Hoffman v JDM Assoc, Inc*, 213 Mich App 466, 473; 540 NW2d 689 (1995). In the case at bar, record evidence established that GM controlled Eagle's daily tasks, not Kibbe. Eagle's only regular contact with Kibbe was his submission of time sheets for payment. Eagle asked his GM supervisor for any time off. After reviewing the record, we conclude that the trial court properly found that GM employed Eagle, and that Kibbe did not retain sufficient control over Eagle's day-to-day activities in order to be held vicariously liable for Eagle's negligence. *Hoffman*, *supra* at 473.

In support of their assertion that Eagle was Kibbe's employee, plaintiff and GM rely heavily on both the language of GM's Manual for Contract Employees (the manual) and Eagle's contract with Kibbe. Both essentially state that Eagle is not GM's employee. The manual was not before the trial court when it decided the motion for summary disposition.[1] Therefore, it is not properly before this Court, and we will not consider it. *Quinto v Cross & Peters Co*, 451 Mich 358, 366-367 n 5; 547 NW2d 314 (1996) (noting that evidence that was not before the trial court when it ruled on the motion for summary disposition should not be considered on appeal). We do note however, that even if the manual was properly before us, its language does not negate the realities of Eagle's daily working environment. GM employed Eagle under the economic realities test and Kibbe retained no control over Eagle's day-to-day activities while he was at GM. And, the language of the agreement is not dispositive. This Court has stated that while it is a factor to be considered, the parties' contract "should not be regarded as dispositive in and of itself" because it may be self-serving and not necessarily a true reflection of the relationship. *Mantei v Michigan Pub School Employees Retirement Sys*, 256 Mich App 64, 85-86; 633 NW2d 486 (2003). The trial court properly found that, for purposes of Eagle's direct liability, GM was Eagle's employer and that for purposes of Kibbe's vicarious liability, Kibbe did not retain sufficient control over Eagle in order to be held liable.

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[1] Plaintiff submitted the manual to the trial court with its motion for reconsideration.

Turning now to the third-party complaint, GM argues that the trial court made improper findings of fact when it determined that GM failed to properly train its employees. Specifically, GM asserts that because evidence existed to contradict the GM employees' testimony that they were not properly trained to conduct a partial tear-out of refractory brick, a genuine issue of material fact existed. Again, we review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When reviewing a motion for summary disposition, this Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"Indemnity contracts are construed in accordance with the general rules for construction of contracts." *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004). "Where the terms of a contract are unambiguous, their construction is a matter of law to be decided by the court." *Id*. However, "[w]hen reviewing a motion for summary disposition, the trial court must carefully avoid making findings of fact under the guise of determining that no issue of material fact exists." *Mahaffey v Attorney General*, 222 Mich App 325, 343; 564 NW2d 104 (1997).

According to the agreement between the parties, GM is required to indemnify Kibbe for any claims arising out of either an act or omission by GM's officers, directors, or employees or GM's failure to perform or comply with the terms of the agreement. The trial court determined, based on deposition testimony, that GM failed to comply with the terms of the agreement because it did not provide Eagle with any "buyer-specific" training. But the record reveals that there was evidence Eagle and at least one of the other employees conducting the tear-out had on-the-job training and experience in such matters. Hence, the trial court made improper findings of fact when it determined that as a matter of law that GM failed to properly train its employees, including Eagle, in violation of the agreement.

There was testimony from GM employees of the following: (1) that GM did not specifically train its employees in refractory brick tear-outs; (2) that the only training employees received was on-the-job training; and (3) that for several years prior to this incident, GM had contracted with an independent contractor specializing in tear-outs to conduct this type of work. However, the record also contained testimonial evidence that at least one of the employees who conducted the tear-out with Hool had performed tear-outs in the past, and, Eagle stated in his affidavit that during the course of his employment with GM, he was "involved in many tear-outs of refractory brick in different furnaces." Further, there was testimony that a document outlining general furnace repair procedures was available to GM employees, but it is unclear how many employees were aware of the document's existence. There was also testimony Eagle and his coemployees would have reviewed safety procedures before they began the tear-out. Viewing this evidence in the light most favorable to GM, reasonable minds could differ regarding whether GM employees, including Eagle, were properly trained to conduct the tear-out. Therefore, the trial court erred in making the determination as a matter of law. *West, supra* at 183.

Kibbe further argues that it is also entitled to indemnification under the agreement because its liability arises out of the acts or omissions of GM's officers, directors, or employees. Particularly, Kibbe asserts that because GM's supervisor decided to perform the tear-out with inexperienced and untrained GM employees rather than with someone specializing in the area of refractory brick tear-outs, Hool's death arose from that decision. However, any connection between the supervisor's decision and Hool's death is too attenuated to fall within the scope of the parties' agreement and without further development of the record, it cannot be said that but for the supervisor's decision to conduct the tear-out with GM's employees, Hool would not have perished.

Kibbe relies on *Grand Trunk Western R, Inc*, *supra* at 345, for the proposition that once GM refused to defend it in this suit, that Kibbe was then only required to show a potential for liability – not actual liability. However, Kibbe's reliance is misplaced because unlike the instant action, in *Grand Trunk Western R, Inc*, the parties had already settled their lawsuit.

For the reasons stated above, the trial court's order granting Eagle's and Kibbe's motions for summary disposition is affirmed, but its order regarding Kibbe's motion for summary disposition on the indemnification claim is reversed and remanded. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly