S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ANTHONY CORRIHER,

Plaintiff-Appellant,

v

GARY HIGHTOWER,

Defendant,

and

PINKERTON'S, INC., and GENERAL MOTORS CORPORATION,

Defendants-Appellees.

UNPUBLISHED
July 25, 2006

No. 267269
Washtenaw Circuit Court
LC No. 03-000190-NI

Before: Neff, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition on the basis that Gary Hightower was not acting within the scope of his employment when he caused injury to plaintiff and, therefore, that defendants could not be held vicariously liable for Hightower's negligence. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, the driver of a semi-truck owned by Schneider National Carriers, Inc., drove onto the premises of defendant General Motors' Willow Run Assembly Off-Site Facility to deliver a load of rims. Marselina Pelham, a security guard employed by defendant Pinkerton, which provided security services for GM, was stationed inside the Willow Run facility's security shack. Pursuant to GM policy, Pelham informed plaintiff that the rear tandem axles of his truck had to be in the rear-most position before he would be permitted to drive past the guard shack. This was required to prevent the truck from tipping when a forklift was driven onto the truck. Plaintiff went to the back of his truck and attempted to release the rear tandems. The tandems would not slide, so plaintiff tried repeatedly to rock the truck back and forth to help release them. In performing this task, plaintiff locked, then released, the trailer brakes; put the tractor in reverse; and backed it up against the trailer brakes before setting the tractor brake and going out to try to pull the pin to release the axle.

Gary Hightower,[1] a Pinkerton employee and Pelham's supervisor, offered to assist plaintiff in moving his axles. Plaintiff first rocked the truck from inside the cab while Hightower tried to pull the pins. Plaintiff then moved to the back of the truck and tried again to pull the pins. Hightower entered the cab of the truck and released the tractor brakes, causing two of the truck's tires to roll forward onto plaintiff's foot and knee. Although Hightower testified that plaintiff agreed to allow Hightower to operate the truck, plaintiff testified that he told Hightower not to enter the cab because he was not a Schneider employee.

The trial court granted defendants' motion for summary disposition, holding that, because the uncontroverted testimony demonstrated that Hightower acted outside the scope and authority of his employment when he assisted plaintiff, defendants could not be held vicariously liable for his conduct.

This Court reviews de novo the grant or denial of a motion for summary disposition. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999); *Tipton v William Beaumont Hosp,* 266 Mich App 27, 32; 697 NW2d 552 (2005). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). "When a motion under [MCR 2.116(C)(10)] is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). The trial court may grant summary disposition under MCR 2.116(C)(10) if, considering the substantively admissible evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Lind, supra* at 238; *Maiden, supra* at 120-121.

Generally, "'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). However, an employer is not liable for an employee's tortious acts committed outside the scope of employment. *Rogers*, *supra* at 651; *Salinas v Genesys Health System*, 263 Mich App 315, 317; 688 NW2d 112 (2004). Even where an employee is working, "'there is no liability on the part of an employer for torts intentionally or recklessly committed by an employee beyond the scope of his master's business.'" *Rogers*, *supra* at 651, quoting *Bradley v Stevens*, 329 Mich 556, 562; 46 NW2d 382 (1951). Furthermore, a tortious act is considered to be outside the scope of employment if the employee steps aside from his employment to gratify some personal animosity or to accomplish some purpose of his own. *Green v Shell Oil Co*, 181 Mich App 439, 446-447; 450 NW2d 50 (1989), citing *Martin v Jones*, 302 Mich 355, 358; 4 NW2d 686 (1942). Nevertheless, vicarious liability may arise where the employee's action was not specifically authorized if the act is similar to or incidental to the conduct that is authorized, taking into consideration such matters as whether the act is commonly done by the employee. *Bryant v Brannen*, 180 Mich App 87, 99-100; 446 NW2d 847 (1989), citing 1 Restatement Agency, 2d, § 229, p 506.

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[1] Hightower, a defendant below, was dismissed from the action and is not a party to this appeal.

We agree with the trial court that plaintiff failed to set forth a genuine issue of material fact regarding whether Hightower's conduct in attempting to operate plaintiff's truck was within the scope of his employment. Indeed, defendants' uncontroverted evidence establishes that Hightower's conduct was specifically *unauthorized*.

Pinkerton's "Job Responsibilities" list for security employees assigned to GM facilities and GM's Security Post Expectations/Procedure Book for the Willow Run plant provided that on-duty Pinkerton security officers' duties with respect to incoming trucks were limited to preparing paperwork, ensuring that persons and trucks were authorized and in conformance with GM policy, and sending the drivers to their designated areas. Consistent with the limited security duties set forth in this documentation, Hightower's supervisor, William Dawson, testified that GM's security contracted employees were always advised not to do anything with delivery trucks or trailers other than performing basic security measures. Dawson and another Pinkerton employee testified that they had never before heard of, or seen, a situation in which a security officer had assisted a driver. Hightower's vague testimony that he "thought" that one other employee had told him about assisting a truck driver does not establish a genuine issue of material fact regarding Hightower's authority to do so. "Speculation and conjecture are insufficient to create an issue of material fact." *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 464; 708 NW2d 448 (2005); see also *Detroit v General Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998).

Furthermore, Dawson testified that he explicitly instructed Hightower to refrain from assisting plaintiff with his axles, and this testimony was not challenged by any evidence to the contrary. Moreover, Hightower himself testified that he *knew* that assisting plaintiff with his axles was outside the scope of his authority as a Pinkerton employee and that he could have been reprimanded for such conduct. Hightower was, in fact, suspended from his employment as a result of the incident.

Contrary to plaintiff's assertion, his testimony that Hightower entered the cab without his consent does not establish an issue of any *material* fact. Whether *plaintiff* sanctioned Hightower's conduct is irrelevant with respect to the scope of his authority as a *Pinkerton* employee. Nor do we agree with plaintiff's contention that vicarious liability attaches because Hightower was acting in furtherance of Pinkerton's (and, by extension, GM's) business by assisting plaintiff so that his delivery could be made and so that other drivers backed up behind plaintiff could get through. The evidence demonstrates that Pinkerton's business was not to facilitate the entry of delivery vehicles onto GM's property; rather, its business, as a security company, was to ensure that only authorized persons and vehicles entered the premises and that such persons and vehicles conformed to GM policy. Because Hightower's actions were clearly beyond the scope of Pinkerton's business, defendants cannot be held liable for his conduct. *Rogers, supra* at 651; *Bradley*, *supra* at 562.

Affirmed.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Brian K. Zahra