STATE OF MICHIGAN

COURT OF APPEALS

ALEXIS DANIELS, Plaintiff-Appellant,	UNPUBLISHED December 15, 2009
v JANET PETROSKY-CLARK and CONSUMER SOURCE, INC., f/k/a HAAS PUBLISHING COMPANIES, INC., Defendants-Appellees.	No. 288403 Oakland Circuit Court LC No. 2007-081118-NI

Before: Talbot, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

In this personal injury action, plaintiff appeals as of right the grant of summary disposition in favor of defendant Consumer Source, Inc. ("defendant"), pursuant to MCR 2.116(C)(10). We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This action arises from an automobile accident on June 27, 2005, in which a vehicle driven by defendant Janet Petrosky-Clark struck plaintiff's vehicle from behind while both vehicles were traveling westbound on 12 Mile Road in Southfield. The issues of Petrosky-Clark's negligence and the amount of plaintiff's damages were submitted to arbitration by stipulation of the parties. The arbitrator awarded plaintiff $501,512.50, and a judgment in favor of plaintiff against Petrosky-Clark was entered in that amount. At issue in this appeal is whether Petrosky-Clark was acting within the scope of her employment as a sales account executive for defendant at the time of the accident, such that defendant may be vicariously liable under the doctrine of respondeat superior. The circuit court found that there was no genuine issue of material fact that Petrosky-Clark was "merely driving to work at the time of the accident" and that there was "no evidence of any sales work done on the date of the collision before the collision took place."

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "A motion brought under MCR 2.116(C)(10) tests the factual support for a claim." *Singerman v Muni Service Bureau,* 455 Mich 135, 139; 565 NW2d 383 (1997). A trial court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden v Rozwood,* 461 Mich 109, 120;

597 NW2d 817 (1999); *Singerman*, *supra* at 139. "The moving party must specifically identify the undisputed factual issues and has the initial burden of supporting its position with documentary evidence." *ER Zeiler Excavating, Inc v Valenti, Trobec & Chandler, Inc,* 270 Mich App 639, 644; 717 NW2d 370 (2006). "The responding party must then present legally admissible evidence to demonstrate that a genuine issue of material fact remains for trial." *Id.* "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Universal Underwriters Group v Allstate Ins* Co, 246 Mich App 713, 720; 635 NW2d 52 (2001). Generally, whether an employee is acting within the scope of his or her authority comprises a question of fact to be resolved by the jury. *Bryant v Brannen,* 180 Mich App 87, 98; 446 NW2d 847 (1989). However, "the issue may be decided as a matter of law where it is clear that the employee was acting to accomplish some purpose of his own." *Id.*

"[A] master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment." *Murphy v Kuhartz,* 244 Mich 54, 56; 221 NW 143 (1928). "An employer is not vicariously liable for acts committed by its employees outside the scope of employment, because the employee is not acting for the employer or under the employer's control." *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002). "For example, it is well established that an employee's negligence committed while on a frolic or detour, or after hours, is not imputed to the employer." *Id.* (citations omitted). However, Michigan courts do recognize a "dual-purpose rule," which holds an employer liable for the torts of its employee "committed while going to or coming from work if the employee's trip involved a service of benefit to the employer." *Kester v Mattis, Inc,* 44 Mich App 22, 24; 204 NW2d 741 (1972). By way of example, an employer can be held liable when the employee is driving their own vehicle on a business trip, *Long v Curtis Publishing Co,* 295 Mich 494, 498; 295 NW 239 (1940), when an employee is driving their own vehicle to a required business meeting, *Ten Brink v Mokma,* 13 Mich App 85, 87; 163 NW2d 687 (1968), or when an employee is driving their own car to deliver the end-of-the-day receipts to an employer at the conclusion of work, *Kester, supra* at 24.

Viewing the documentary evidence submitted by the parties in a light most favorable to plaintiff, we conclude that the circuit court erred in granting summary disposition to defendant. Petrosky-Clark testified in her deposition that at the time of the accident, she lived in the vicinity of 12 Mile between Southfield and Evergreen, and defendant's office was located approximately nine miles away in the 12 Mile and Haggerty area. Although plaintiff stated that she was going "[t]o work" when the accident occurred, the documentary evidence also indicated that most of Petrosky-Clark's job entailed traveling in her car to various locations.[1] In response to plaintiff's requests for admissions, Petrosky-Clark admitted that she was required to attend a weekly, not daily, sales meeting at defendant's office, that 60 percent of her duties were performed outside of defendant's office, and that defendant required her to perform the "majority" of her duties

[1] Petrosky-Clark was required to submit a copy of her state-issued driving record and proof that her car was insured before defendant would employ her, and she received a $4,800 annual car allowance as part of her compensation.

making sales calls on clients outside the location to which she was driving at the time of the accident. In contrast, in her deposition, Petrosky-Clark testified that she "rarely" made sales calls before going into the office because:

> We had morning sales' meetings. So we normally started our days at our office with a rare exception that, you know, if we had a very important client and that was the only time in the mornings that they could meet. But that was rare.

A performance review conducted after the accident required Petrosky-Clark, "until further notice," to "start her day in the office and end her day in the office to follow up with her work." As plaintiff argues, a jury could infer from this evidence that, before the performance review, Petrosky-Clark was not required to begin and end her workday in defendant's office. Further, in her deposition, Petrosky-Clark acknowledged it was "likely" that she had "collateral material in [her] briefcase," belonging to the employer involving a client meeting conducted the previous day, which would be turned in at the office. However, Petrosky-Clark also acknowledged that she had no recall, on the particular day of the accident, of her actual schedule. Based on these statements, a jury could reasonably infer that Petrosky-Clark's normal place of employment was her car and that driving "to work" had a different meaning for her than for an employee who works primarily at one location.

The issue of whether an employee was acting within the scope of employment is generally for the trier of fact unless "it is clear that the employee was acting to accomplish some purpose of his own." *Bryant, supra* at 98. Because the evidence here was not definitive and a genuine issue of fact existed, the circuit court erred in granting summary disposition to defendant.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Alton T. Davis