

STATE OF MICHIGAN
COURT OF APPEALS

XIN WU and NINA SHUE,
Plaintiffs,

UNPUBLISHED
March 15, 2011

and

WILLIAM LANSAT, as Personal Representative
of the Estate of SOL-IL SU,
Plaintiff-Appellant,

v

RONALD DEAN JOHNSON,
Defendant,

No. 294250
Wayne Circuit Court
LC No. 08-110100-NI

and

LEGAL AID AND DEFENDER ASSOCIATION,
INC.,
Defendant-Appellee.

Before: MURPHY, C.J., and STEPHENS and M.J. KELLY, JJ.

PER CURIAM.

This case involves an accident in which defendant Ronald Dean Johnson (Johnson), an attorney, struck pedestrians Xin Wu and Sol-Il Su with his vehicle as Johnson was driving to work at the courthouse. Wu was injured and Su was killed in the accident. Plaintiff Wu, joined by his wife, plaintiff Nina Shue, filed an action against Johnson and his employer, defendant Legal Aid and Defender Association, Inc. (Legal Aid). Plaintiff William Lansat, as the personal representative of the estate of Su, also filed an action against Johnson and Legal Aid, and the two lawsuits were subsequently consolidated. The trial court granted summary disposition in favor of Legal Aid with respect to the vicarious liability claims brought against it by plaintiffs. Plaintiffs later settled their claims against Johnson, resulting in signed releases and a dismissal. Plaintiff Lansat appeals the summary dismissal of his personal representative claim against Legal

Aid that was predicated on an employer-employee agency relationship between Johnson and Legal Aid and the associated doctrine of vicarious liability. We affirm.

The parties raise two issues on appeal. First, plaintiff Lansat argues that the trial court erred in dismissing the suit against Legal Aid, where there were genuine issues of material fact regarding whether Legal Aid is vicariously liable for Johnson's conduct. Second, Legal Aid maintains that, as an alternative ground to affirm dismissal, when Johnson was released from liability by way of the settlements, the releases also operated to discharge Legal Aid from any vicarious liability. The latter issue entails the question of whether MCL 600.2925d, as amended in 1995, abrogated the common-law rule that the release of an agent operates to release the principal. Because we conclude that the trial court correctly ruled that Legal Aid was entitled to summary disposition where Johnson was not acting within the scope of his employment in traveling to work, we need not address Legal Aid's alternative argument relative to the impact of the releases.

We review decisions on motions for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition under MCR 2.116(C)(10) is appropriately granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). In reviewing the trial court's decision, "we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.*

"An employer is liable only for the acts of its employee committed within the scope of employment." *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343; 497 NW2d 585 (1993). Plaintiff first argues that there remains a material factual dispute regarding whether the workday commenced at 8:30 a.m. for attorneys employed by Legal Aid. Plaintiff appears to argue that an employee is automatically acting within the scope of employment if the workday has commenced or the employee is otherwise "on the clock." We disagree.¹

Plaintiff cites no authority suggesting that the typical time period or shift of employment is dispositive to the inquiry whether an employee is acting within the scope of his or her employment. Certainly, one can imagine situations in which an employee might act outside the scope of employment during working hours or where an employee might act within the scope of employment by assisting an employer after hours. For example, if an employee is normally scheduled to start work at 9:00 a.m., and, deciding instead to go in late at 11:00 a.m. on a particular day, the employee commits a negligent act at home at 10:00 a.m. and injures a neighbor, it would be nonsensical to conclude that the employee was acting within the scope of employment merely because the incident occurred after 9:00 a.m. In that scenario, the employee had not yet started work when the incident occurred. And even if the employee was salaried

¹ We note that the evidence established that, during the time frame at issue, all attorneys working for Legal Aid were directed to start their workday at the courthouse. Legal Aid had its own office away from the courthouse and a satellite office at the courthouse.

with the understanding that the workday started at 9:00 a.m., it would not change the fact that the incident did not occur while the employee was working. Mere common sense prevents an employee's time shift from serving as the guidepost in regard to the "scope of employment" inquiry, although the issue might be relevant as to the larger picture in some situations. In addition, caselaw does not support plaintiff's position. In *Rogers v J B Hunt Transport, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002), our Supreme Court stated:

[A] master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment. 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. 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. In addition, even where an employee is working, vicarious liability is not without its limits. [Citations and internal quotations omitted.]

In *Riley v Roach*, 168 Mich 294, 307-308; 134 NW 14 (1912), the Michigan Supreme Court observed:

The test of the liability of the master for his servant's acts is whether the latter was at the time acting within the scope of his employment. The phrase "in the course or scope of his employment or authority," when used relative to the acts of a servant, means while engaged in the service of his master, or while about his master's business. *It is not synonymous with "during the period covered by his employment."* [Emphasis added.]

Regardless of when Johnson was supposed to be at or start work, the fact is that he was not yet at work, nor had he started work, when the accident occurred. Because the time at which the workday of an attorney employed by Legal Aid commences is not determinative on the "scope of employment" issue, the question, although perhaps in dispute, is not material here and cannot form the basis for finding summary disposition improper. For the same reason, we are not persuaded by plaintiff's argument that it is for the jury to judge the accuracy and reliability of the witnesses who provided conflicting testimony regarding the start of the workday.

Plaintiff next argues that Johnson was acting within the scope of his employment because he was not acting to accomplish some purpose of his own at the time of the accident; rather, he was headed to the courthouse at Legal Aid's directive. According to Legal Aid, however, as a matter of law, an employee on his way to work is not acting within the scope of employment. We agree with Legal Aid in this regard.

"While the issue of whether the employee was acting within the scope of his employment is generally for the trier of fact, 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." *Bryant v Brannen*, 180 Mich App 87, 98; 446 NW2d 847 (1989). With respect to situations in which the employee is driving to or from work, Michigan follows, in the analogous worker's compensation context, the general rule of employer nonliability:

As a general rule, injuries sustained by an employee going to and from work are not compensable. Exceptions to this rule exist when (1) the employee is on a special mission for the employer, (2) the employer derives a special benefit from the employee's activity at the time of the injury, (3) the employer paid for or furnished employee transportation as part of the employment contract, (4) the travel comprised a dual purpose combining employment-related business needs with the personal activity of the employee, (5) the employment subjected the employee to excessive exposure to traffic risks, or (6) the travel took place as a result of a split-shift working schedule or employment requiring a similar irregular nonfixed working schedule. In other words, an employee is entitled to compensation when there is a sufficient nexus between the employment and the injury so that it may be said that the injury was a circumstance of the employment. [*Thomas v Staff Builders Health Care*, 168 Mich App 127, 129-130; 424 NW2d 13 (1988) (citations omitted).]

Subject to some exceptions, the general rule of law is that injuries sustained when an employee is driving to and coming from work are not compensable as they do not occur within the scope of employment, especially where the situation is just an ordinary case of a person traveling to and from work. *Bush v Parmenter, Forsythe, Rude & Dethmers*, 413 Mich 444, 451-452; 320 NW2d 858 (1982).

Plaintiff argues that several of the exceptions to the rule exist in this case. First, according to plaintiff, Johnson was on a special mission for Legal Aid by driving to the courthouse for the purpose of providing attorney coverage in the courtrooms pursuant to the contract between Legal Aid and the court. Yet plaintiff provides no support for the contention that merely traveling to work, as one does every day, constitutes a "special mission" as the exception requires. Instead, as Legal Aid argues, we find that Johnson was not on a special mission because he normally reported to the courthouse to start the day. The fact that Legal Aid directed its attorneys to start the day at the courthouse is no different than any other employer directing its employees to start their day at the employer's place of business. The bottom line is that Johnson had not started work when the accident took place.

Second, plaintiff contends that Legal Aid derived a special benefit from Johnson's activity in driving to the courthouse. Plaintiff, again, provides no legal basis for the argument that commuting to work confers a special benefit on an employer. This Court addressed the issue in *Stark v L E Myers Co*, 58 Mich App 439, 443-444; 228 NW2d 411 (1973), wherein the panel stated:

It is likewise difficult to discern [how] the employer derived any special benefit from the fact that plaintiff was in the process of driving to work. If any benefits were so derived, it was not a special benefit to the employer but a benefit common to all employers. . . . Almost without exception employees drive or are driven to work over distances great or small. At the time that work begins by an employee then do benefits arise in favor of the employer. It does not follow that because employees are an integral part of industry that benefits are conferred while the employee is going to or from work. We are constrained to hold that the

fact of travel to and from work by the plaintiff in this case resulted in no benefit to the employer upon which compensation may be based.

Similarly, in *Bowman v Coolsaet Constr Co (On Remand)*, 275 Mich App 188, 191; 738 NW2d 260 (2007), this Court stated that, “[g]enerally speaking, an employer receives no special benefit from an employee’s travel to or from work.” In accordance with *Stark* and *Bowman*, we conclude that Legal Aid did not derive any special benefit from Johnson while he commuted to the courthouse.

Third, according to plaintiff, although Legal Aid did not provide Johnson with his vehicle, Legal Aid paid attorneys 40 cents per mile for certain trips. This argument lacks merit. The record clearly indicates that Legal Aid paid attorneys 40 cents per mile only for home visits. At the time of the accident, Johnson was not on his way to a client’s home, but was simply reporting to the courthouse as he did on a daily basis. “Where the employer provides a vehicle, guarantees transportation, reimburses identifiable travel expenses, or provides an identifiable sum for travel time, it is probable that the employer has contracted for the employee’s travel.” *Pappas v Sports Services, Inc*, 68 Mich App 423, 429; 243 NW2d 10 (1976). This was not the situation in the case at bar. Plaintiff’s related argument that attorneys working for Legal Aid begin receiving payment at 8:30 a.m. is similarly without merit. Attorneys working for Legal Aid are salaried; they are not paid beginning or ending at any particular time. Therefore, the third exception is inapplicable.

Fourth, plaintiff argues that Johnson’s drive to work served a dual purpose, with both business and personal objectives. Legal Aid, however, argues that the commute was not undertaken for more than one purpose; rather, commuting was undertaken for the simple personal objective of arriving at work. We agree with Legal Aid’s assessment, as there was no dual purpose in Johnson merely driving to work.

Fifth, according to plaintiff, given the amount of travel that Legal Aid required staff attorneys to undertake, Legal Aid subjected Johnson to excessive exposure to traffic risks. Legal Aid, however, argues that it did not expose Johnson to excessive traffic risks; he was on the Lodge service drive in Detroit, the city in which he worked every day. In *Bowman*, this Court recognized that “[a]ll travel entails certain risks.” *Bowman*, 275 Mich App at 193. Here, as in *Bowman*, there exists no evidence to suggest that Johnson’s route between work and home “exposed him to excessive risk not borne by travelers in general.” *Id.*

Sixth, and finally, plaintiff argues that Legal Aid required attorneys to work irregular, nonfixed working schedules. We disagree. Legal Aid expected its attorneys to arrive every day at the courthouse at 8:30 a.m. Accordingly, without an applicable exception, the general “while driving to work” rule of employer nonliability must be invoked, and Legal Aid cannot be held vicariously liable for the accident.

Further, the cases that plaintiff cites to support the argument that driving to work is considered within the scope of employment are distinguishable. For example, in *Murphy v Kuhartz*, 244 Mich 54; 221 NW 143 (1928), the Michigan Supreme Court held that an employee truck driver was acting within the scope of his employment where he made a delivery, stopped at his home to eat dinner, began driving the truck back to his employer’s warehouse in order to

record the earlier delivery, and then proceeded to strike the plaintiff with the truck before reaching the warehouse. Thus, in *Murphy*, the truck driver was engaged in the overall delivery process, which had started before he broke for dinner, when the accident occurred, but here Johnson had yet to even begin work for the day. Additionally, in *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 409-410; 605 NW2d 690 (1999), this Court held that a school teacher who worked at two schools was acting in the scope of her employment when she got into an automobile accident as she shuttled between the two schools. The teacher started the day at one school, taught a class, and then commuted to a second school to teach other classes. It was during the commute that the accident occurred. *Id.* at 404-405. Thus, the teacher was in the middle of her work day when the accident occurred as she drove between assignments and not simply on her way to work to start the day, nor on her way home to conclude the day.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly