COURT OF APPEALS
DECISION
DATED AND FILED

February 6, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1050 **Cir. Ct. No. 2005CV303**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

TAMMY S. BERGENE,

PLAINTIFF-APPELLANT,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

WILLIAM J. KUMBALEK, LORI P. KUMBALEK AND SECURA INSURANCE, A MUTUAL COMPANY,

DEFENDANTS-RESPONDENTS,

MICHAEL P. RUHLAND,

DEFENDANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOSEPH M. TROY, Judge. *Reversed and cause remanded for further proceedings.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Tammy Bergene appeals a summary judgment granted to Lori and William Kumbalek and dismissing Bergene's case. We conclude summary judgment was not appropriate because there are disputed material facts. Therefore, we reverse and remand for further proceedings.

BACKGROUND

¶2 This case arises from a May 27, 2004 car accident resulting in the death of Bergene's husband, Scott Bergene. Bergene filed a wrongful death suit against Michael Ruhland, the driver who hit Scott's car, and his insurance carrier. Bergene also named Ruhland's employers, Lori and William Kumbalek, and their insurer on a theory of respondeat superior.

¶3 Prior to the car accident, Ruhland began providing babysitting services for the Kumbaleks' children. He also provided landscaping services for the Kumbaleks. Ruhland stated Lori gave him a written list of ground rules about babysitting. Ruhland further stated he was to keep track of his time and was paid the same for his babysitting and landscaping services. However, Lori asserted Ruhland was not paid a regular rate. Lori claimed she determined Ruhland's pay based on what she could afford at any given time and sometimes paid in barter. Lori also stated Ruhland had no regular schedule and she never knew whether he was going to work for her on any particular day. Lori stated this arrangement was acceptable because her oldest daughter could watch the younger children if Ruhland did not. However, Ruhland stated that his hours were only flexible for the landscaping services and that for the babysitting he "had to be there."

¶4 At the time of the accident, Ruhland was returning from picking up Ben, the Kumbaleks' youngest child, from daycare. Ruhland admitted he used his own car, paid for his own gas, and did not expect to be reimbursed for the gas. While Ruhland says he discussed the route with Lori, he admitted he selected the route on the day of the accident and knew he was free to take another route if he chose. Ruhland also admitted picking up Ben was not a regular part of his duties and he could have refused to pick up Ben. However, Ruhland stated he picked up Ben at Lori's request, believed he was on duty as a babysitter at the time, and was later paid for the service. However, Lori claimed Ruhland asked to pick Ben up in order to take him to a picnic at Ruhland's parents' house. Lori also claimed she never paid Ruhland for picking up Ben on the day of the accident.

¶5 The Kumbaleks filed a summary judgment motion, arguing Bergene's respondeat superior claim failed because there was no master-servant relationship between the Kumbaleks and Ruhland at the time of the accident. Bergene also filed for summary judgment and requested the court find as a matter of law that there was a master-servant relationship between Ruhland and the Kumbaleks. The court held there was no master-servant relationship and dismissed the case.

STANDARD OF REVIEW

¶6 We review summary judgments de novo, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** "If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance,

it would be improper to grant summary judgment." ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980).

DISCUSSION

¶7 Under the theory of respondeat superior, a master is liable for the negligent acts of his or her servant. ***Heims v. Hanke***, 5 Wis. 2d 465, 468, 93 N.W.2d 455 (1958). "A servant is one employed to perform service for another in his [or her] affairs and who, with respect to his [or her] physical conduct in the performance of the service, is subject to the other's control or right to control." ***Id.*** In determining whether an individual is a servant or an independent contractor, the "right to control is the dominant test…." ***Kashishian v. Port***, 167 Wis. 2d 24, 33, 481 N.W.2d 277 (1992) (citation omitted). "However, other factors are considered, including the place of work, the time of the employment, the method of payment, the nature of the business or occupation, which party furnishes the instrumentalities or tools, the intent of the parties to the contract, and the right of summary discharge of employees." ***Id.*** (citation omitted).

¶8 Our supreme court has stated "parents have the 'right to control' the details of their baby-sitter's work and that this gives the parents the degree of control necessary to establish an employer-employee relationship." ***Szep v. Robinson***, 20 Wis. 2d 284, 289, 121 N.W.2d 753 (1963).[1] However, the facts of

[1] The trial court determined this language in ***Szep v. Robinson***, 20 Wis. 2d 284, 289, 121 N.W.2d 753 (1963), is dicta, stating:

> The issue in ***Szep*** was not vicarious liability and, therefore, the attention and focus of the Court's analysis was not on that point. It was on the liability of the parents of the child that the young woman was babysitting for, and whether there is liability arising from the relationship….

(continued)

the ***Szep*** case are different than the present case. Unlike the present case, in ***Szep*** there was no dispute that the babysitter was providing babysitting services at the time of the incident. Further, in ***Szep*** the incident occurred in the parents' home, not in the babysitter's car.

¶9 Wisconsin courts have treated employees hired to transport people or goods as independent contractors rather than servants. In the case of a dairy hauler, the supreme court concluded the dairy hauler was simply an independent contractor because the hauler "had complete control over the operation of the truck." Additionally, the hauler "could drive in the manner in which he saw fit, and he was free to take whatever route of travel he wished." ***Carothers v. Bauer***, 23 Wis. 2d 15, 28, 126 N.W.2d 758 (1964). In a similar case, we determined a driver hired to transport children to and from school in her car was an independent contractor and not a servant. ***Reuter v. Murphy***, 2000 WI App 276, ¶¶1, 18, 240 Wis. 2d 110, 622 N.W.2d 464.[2] The court reasoned the driver "had no written contract or oral agreement with the school district regarding the particulars of her job except which students to pick up and at what times. She chose her own routes

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> [A] master-servant relationship was mentioned in the Complaint in the action, but it didn't form any part of the holding. It was irrelevant to the holding of the ***Szep*** decision whether or not the babysitter was in the relationship of master-servant or otherwise an employee.

We disagree. The court in ***Szep*** had to determine that the babysitter was not an independent contractor in order to establish liability. ***Id.*** at 288-89. While the court did use the term employee rather than servant, the issue was whether the employer had a right to control the babysitter. ***Id.***

[2] ***Reuter v. Murphy***, 2000 WI App 276, ¶¶1, 18, 240 Wis. 2d 110, 622 N.W.2d 464, was not a respondeat superior case, yet analyzed the master-servant relationship under the same control test and relied on ***Carothers v. Bauer***, 23 Wis. 2d 15, 126 N.W.2d 758 (1964), in its analysis.

without restriction…. The maintenance of her vehicle was left to her discretion…." ***Id.*** at ¶18.

¶10 There is no dispute that Ruhland provided babysitting services to the Kumbaleks. However, it is not clear to what extent the Kumbaleks exercised control over Ruhland, especially at the time of the accident. Ruhland may have been an unpaid volunteer. While an unpaid volunteer may be a servant, the master still must have a right to control the volunteer and the activity must be for the master's benefit. ***Giese v. Montgomery Ward***, 111 Wis. 2d 392, 415-16, 331 N.W.2d 585 (1983). At the time of the accident, Ruhland was not at the Kumbaleks' house but was returning from picking up Ben from daycare. While Ruhland states this was done at Lori's request and he was on-duty as a babysitter at the time, Lori disputes this and insists Ruhland asked to pick up Ben, she already had other plans for picking up Ben, and she never paid Ruhland for the task. If Ruhland picked up Ben for a family picnic and not at Lori's request, then Lori may not have exercised control over Ruhland at the time of the accident and may not have benefited from Ruhland's service. Therefore, this is a disputed material fact that makes summary judgment inappropriate.

¶11 Further, while ***Szep*** indicates that parents have a right to control their babysitter, there are a number of facts in this case suggesting that Ruhland was not a typical babysitter. While Ruhland states he had a list of responsibilities and was expected to be at the residence at certain times, Lori claims there was a great deal of flexibility in the position and she never knew if Ruhland would baby-sit on any given day. Further, Ruhland admits picking up Ben was not a part of his regular duties and he could have refused. He also admits that while he discussed the route to the daycare with Lori and had picked up Ben from daycare on a couple previous occasions, he chose the route, paid for his own gas, and did not expect to be

reimbursed for the gas. If Ruhland indeed picked up Ben at Lori's request, these facts could indicate that Lori did not exercise the degree of control present in a usual babysitting case and instead Ruhland functioned as an independent contractor like the drivers in ***Carothers*** and ***Reuter***. Because these facts are subject to conflicting interpretations, summary judgment is not appropriate. ***Grams***, 97 Wis. 2d at 339. Therefore, we reverse the summary judgment dismissing the action and the matter is remanded for further proceedings.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.