DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

ALICIA MCKEE, individually and as Personal Representative of the **ESTATE OF PAUL JAMES MCKEE**,
Appellant,

v.

CRESTLINE HOTELS & RESORTS, LLC,
d/b/a **HILTON SINGER ISLAND OCEANFRONT/PALM BEACHES,**
Appellee.

No. 4D2022-3428

[January 10, 2024]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Jaimie R. Goodman, Judge; L.T. Case No. 502019CA00032.

George A. Vaka and Robert C. Hubbard of Vaka Law Group, P.L., Tampa, for appellant.

Sharon C. Degnan of Kubicki Draper, Orlando, for appellee.

GROSS, J.

The plaintiff below, Alicia McKee, individually and as personal representative of her husband's estate, appeals a final summary judgment in favor of a defendant below, Crestline Hotels & Resorts, LLC d/b/a Hilton Singer Island Oceanfront/Palm Beaches.

The case arises from a hit-and-run auto accident that seriously injured the plaintiff and killed her husband. The plaintiff sought to impose liability against Crestline on a theory of respondeat superior—that the accident was caused by a Crestline employee acting within the scope of his employment.

The question presented is whether the circuit court erred in concluding as a matter of law that the employee driver was not acting in the scope of his employment when he hit the plaintiff and her husband in a crosswalk, even though the plaintiff presented evidence suggesting that the driver was calling or attempting to call his employer at the moment of the collision.

We hold that, as a matter of law, the driver was not acting within the scope of his employment by using his personal cell phone to call his employer at the time of the accident.

The Accident

On an evening in December 2017, Alicia and Paul McKee were visiting West Palm Beach. At about 9:13 p.m., they began to cross Quadrille Boulevard in the crosswalk at Hibiscus Street on a do-not-walk signal. As they crossed, they were struck by an SUV driven by Anthony Horsford. Horsford had a green light as he traveled south on Quadrille. Although Horsford denied speeding, an eyewitness estimated that Horsford was going about 40 to 50 mph in a 35 mph zone. After the collision, Horsford stopped, got out of his vehicle, looked at the McKees lying in the street, and then drove off.

Horsford's Employment as a Banquet Manager for Crestline

On the day of the incident, Crestline employed Horsford as a banquet manager at the Hilton Singer Island Resort. He worked about 50 hours a week as a salaried employee. He did not have set hours or punch a time clock. His duties included setting up and overseeing banquet events, and his responsibility for an event continued "until everything was cleaned up." He was thus in charge of every part of the banquet "from start to finish."

Although Horsford had total responsibility for banquets, he would typically leave before the event was over and place the banquet captain in charge. Both Crestline's general manager and Horsford's direct supervisor agreed that once food was served and everything was running smoothly, the banquet manager could assign cleanup tasks and leave the property.

Ultimately, Horsford was the one accountable for banquets. If a problem occurred during a banquet and Horsford's supervisors were not on the premises, the banquet staff would call Horsford, and he would be expected to respond if he received a phone call.

Crestline had no rules addressing how Horsford should handle phone calls when away from work. However, Crestline had an unwritten policy that he was expected to respond to calls from work, if he could. Even when Horsford was not at work, he would often call and check with a banquet captain on whether his previous instructions were carried out.

Crestline did not compensate Horsford for mileage accrued in the operation of his personal vehicle, because, as the food and beverage manager explained, "We work on location."

The Day of the Incident

On the day of the incident, Horsford managed a hotel event celebrating a quinceañera from 5 p.m. to 9 p.m. He left the hotel at around 8:45 p.m. while guests were still present and before cleanup had started.

Before leaving, Horsford gave a banquet captain general instructions about cleaning up and other tasks that needed to get done at the end of the event. According to a banquet captain, she had no reason to speak with Horsford that night after he left the premises. Horsford likewise testified that he had nothing else to do for the banquet after he left.

Horsford got in his vehicle and started driving home, which would normally take 20-25 minutes. He was not running any errands for Crestline. He denied making any phone calls or using his cell phone on his way home. He claimed that he "never" called the hotel at any point.

About 10-15 minutes into the drive, Horsford felt like he hit a "pothole" as he was driving south on Quadrille. He testified that he was not on his cell phone or otherwise distracted at the time of impact. Prior to feeling like he hit a pothole, he did not see anyone near the roadway.

Horsford testified that he looked through his rearview mirror and "saw nothing," so he did not stop. By contrast, a witness said that Horsford stopped, got out of his vehicle for a few seconds, looked back towards the intersection where the McKees were lying on the ground, and then drove away.

Although Horsford denied making any phone calls or using his cell phone during his drive home, other evidence shows that Horsford was using his personal cell phone near the time of the incident. This evidence was ambiguous, however, as to whether he was using his phone to place a work-related call at the precise moment his car struck the McKees.

The first 911 call about the accident was received at 9:13:06 p.m. A witness stated that he called 911 "immediately" or "within a minute" after the accident. Horsford's T-Mobile phone records show that he made a completed phone call of unknown duration to the hotel at 9:14:37 p.m., but a traffic homicide detective was not able to identify anyone at the hotel who received this call.

Then, at 9:16, 9:17, and 9:20 p.m., three outgoing calls were placed from Horsford's number to a banquet captain's number through different cell phone towers, showing that Horsford's vehicle was traveling south while he was making the calls. The banquet captain looked at her phone and saw missed calls from Horsford. She called him back immediately, thinking he had forgotten to tell her something or had wanted to give her new instructions.

When describing this phone call in her deposition, the banquet captain testified that Horsford first talked to her about his instructions regarding "tables, chairs, tablecloths, [and] stuff like that," as the banquet was still ongoing. However, he didn't sound like himself on the call. He seemed illogical, he opened up about "hitting something," and he repeated instructions he had previously given her before leaving for the night, which she thought was strange.

The traffic homicide detective testified that he did not know whether the time clock used by the 911 dispatch system was synchronized with T-Mobile's time clock. The detective was therefore unable to determine whether Horsford "was making a call or on a call at the time" of impact, as "that was not part of my investigation."

The plaintiff's forensic cell phone expert maintained that Horsford's cell phone records were "consistent with" his phone being used to call the hotel's main number "from the location and moment in time that Mr. and Mrs. McKee were struck at the intersection of Hibiscus and Quadrille" in West Palm Beach. The expert stated that the call times in the T-Mobile and 911 records "were from different sources and within the acceptable margin for differences in time between two systems."

The Litigation and the Summary Judgment

The plaintiff sued Crestline, alleging that Horsford was acting within the scope of his employment with Crestline at the time of the accident. Crestline eventually filed an amended motion for summary judgment, relying upon the "going and coming" rule and arguing that Horsford was not acting within the course and scope of his employment when the accident occurred because he was driving home in his personal car and was not running an errand for Crestline.

The plaintiff filed her opposition to summary judgment, arguing that a genuine dispute of material fact existed as to whether Horsford was acting

within the scope of his employment with Crestline when the accident occurred.

Following a hearing, the circuit court granted Crestline's motion for summary judgment. For the purpose of addressing the motion, the court assumed that Horsford was calling or attempting to call Crestline on his personal cell phone at the time of the collision, though the court described the record as "inconclusive" on this point. Ultimately, the court concluded that Horsford was not acting within the scope of his employment at the time of the accident.

Standard of Review

The standard of review for orders granting summary judgment is de novo. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Florida's new summary judgment rule, which is to be applied in accordance with the federal standard, states that summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510(a). A genuine factual dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In a summary judgment proceeding, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

Florida Law on Respondeat Superior

"An employer is vicariously liable for compensatory damages resulting from the negligent acts of employees committed within the scope of their employment even if the employer is without fault." *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545, 549 (Fla. 1981). Whether an employee's act was within the scope of employment is generally a question of fact for the jury. *Lay v. Roux Labs., Inc.*, 379 So. 2d 451, 453 (Fla. 1st DCA 1980).

For purposes of imposing vicarious liability on the employer, an employee's conduct is within the scope of employment only if the following three-prong test is satisfied: "(1) the conduct is of the kind the employee is hired to perform, (2) the conduct occurs substantially within the time and space limits authorized or required by the work to be performed, and (3) the conduct is activated at least in part by a purpose to serve the master." *Sussman v. Fla. E. Coast Props., Inc.*, 557 So. 2d 74, 76 (Fla. 3d DCA 1990);

Craft v. John Sirounis & Sons, Inc., 575 So. 2d 795, 796 (Fla. 4th DCA 1991) (following *Sussman*); *Morera v. Sears Roebuck & Co.*, 652 F. App'x. 799, 801 (11th Cir. 2016) (following *Sussman*).

"The underlying philosophy which holds an employer liable for an employee's negligent acts is the deeply rooted sentiment that a business enterprise should not be able to disclaim responsibility for accidents which may fairly be said to be the result of its activity." *Carroll Air Sys., Inc. v. Greenbaum*, 629 So. 2d 914, 916–17 (Fla. 4th DCA 1993). The imposition of respondeat superior liability upon the employer involves "the allocation of the economic cost of an injury resulting from a risk incident to the enterprise." *Id.* at 917 (quoting *Rodgers v. Kemper Constr. Co.*, 124 Cal. Rptr. 143, 149 (Cal. Ct. App. 1975)) (emphasis removed).

The doctrine of respondeat superior "is based upon the long-recognized public policy that victims injured by the negligence of employees acting within the scope of their employment should be compensated even though it means placing vicarious liability on an innocent employer." *Smith*, 393 So. 2d at 549. "It is a fundamental rule that the respondeat superior doctrine applies only when the alleged master has the ability and authority to direct and control the pertinent acts of the employee." *Vasquez v. United Enters. of Sw. Fla., Inc.*, 811 So. 2d 759, 760 (Fla. 3d DCA 2002).

"Florida courts do not use the label 'employer' to impose strict liability under a theory of respondeat superior but instead look to the employer's control or right of control over the employee at the time of the negligent act." *Id.* at 761. "[I]t is the right of control, not actual control or descriptive labels employed by the parties, that determines an agency relationship." *Hickman v. Barclay's Int'l Realty, Inc.*, 5 So. 3d 804, 806 (Fla. 4th DCA 2009) (emphasis removed).

"[F]or an employer to be vicariously liable for the acts of his employee, the employee's conduct must in some way further the interests of the employer or be motivated by those interests." *Bennett v. Godfather's Pizza, Inc.*, 570 So. 2d 1351, 1354 (Fla. 3d DCA 1990).

For example, in *Allan v. Graf*, 43 So. 3d 151, 152 (Fla. 4th DCA 2010), we held that an employer cannot be held vicariously liable for an employee's negligence in mishandling the car keys to his own car, thereby allowing a thief to steal the car and injure a third party. We emphasized that "the employee's use of his own car was primarily for his own convenience" and that the imposition of respondeat superior liability involved "the allocation of the economic cost of an injury resulting from a risk incident to the enterprise." *Id.* at 153–54 (citation omitted). We

concluded: "Florida law has determined that liability in key mishandling cases is an aspect of the ownership of a motor vehicle, so that the cost of such negligence is imposed on an owner for the owner's negligence and nothing more." *Id.* at 154.

Courts also consider the "purpose of the employee's act, rather than the method of performance" as being an important consideration." *Hennagan v. Dep't of Highway Safety & Motor Vehicles*, 467 So. 2d 748, 751 (Fla. 1st DCA 1985). Even "unauthorized 'conduct may be considered within the scope of employment . . . if it is of the same general nature as that which is authorized and/or is incidental to the conduct authorized.'" *Desvarieux v. Bridgestone Retail Operations, LLC*, 300 So. 3d 723, 728 (Fla. 3d DCA 2020) (quoting *Hennagan*, 467 So. 2d at 750) (internal square brackets omitted).

The "going and coming" rule operates as a significant limitation on the imposition of respondeat superior liability. Under the "going and coming" rule, "an employee driving to and from work is not within the scope of employment so as to impose liability on the employer." *Peterson v. Cisco Sys., Inc.*, 320 So. 3d 972, 974 (Fla. 2d DCA 2021). The "going and coming" rule is "based in large measure on the policy consideration of the attenuated degree of control over the employee's actions, particularly while driving an employee-owned vehicle." *Hernandez v. Tallahassee Med. Ctr., Inc.*, 896 So. 2d 839, 843–44 (Fla. 1st DCA 2005). Because the employee is away from the job site, an employer's ability to control a commuting employee's driving conduct is minimal—traffic laws are a more significant deterrent to careless driving than an employer's rules, since one job of police officers is to enforce those laws on the street.

An exception to the "going and coming" rule has applied in situations where the employee was on a "special errand" for the employer. *Robelo v. United Consumers Club, Inc.*, 555 So. 2d 395, 396 (Fla. 3d DCA 1989). For example, if an employee is not merely commuting but is also running an errand for their employer, a question of fact arises regarding whether the employee's negligent driving to or from work falls within the scope of employment.

Thus, in *Standley v. Johnson*, 276 So. 2d 77 (Fla. 1st DCA 1973), the First District held that a question of fact existed as to whether an employee was acting within the scope of his employment where he "was doing more than merely driving to work," and "had been instructed to keep the lawn mower filled with gas and was in fact transporting gas to the nursery as part of his job and for the benefit of his employer." *Id.* at 78; *see also Alsay-Pippin Corp. v. Lumert,* 400 So. 2d 834, 835 (Fla. 4th DCA 1981)

(upholding jury verdict finding employee was acting within the scope of employment, even though the accident occurred while the employee was driving home, where the evidence showed that the employee was driving home after completing an errand for his employer that "could not be fulfilled along his usual route from work to home").

The flip side of the "going and coming" rule occurs when an employee "steps aside from his employment to . . . accomplish some purpose of his own"; such an act is not within the scope of employment. *Trabulsy v. Publix Super Mkt., Inc.*, 138 So. 3d 553, 555 (Fla. 5th DCA 2014).

Application of Florida Law to This Case

As a preliminary matter, we assume that a reasonable jury could conclude Horsford was calling or attempting to call the hotel at the time of the accident to give instructions regarding the ongoing quinceañera event or to otherwise further the employer's interests.

Applying the *Sussman* three-prong test, we hold that no reasonable jury could find Horsford was acting within the scope of his employment at the time of the accident. Thus, the trial court properly granted summary judgment in favor of Crestline.

As to the first *Sussman* prong, the trial court correctly reasoned that "[t]he act of using a personal cellular phone while driving home from work is not the kind of act [] Horsford was hired to perform as a banquet manager." The allegedly tortious conduct in this case is Horsford's negligent driving of his vehicle, not his conduct of providing instructions regarding the ongoing banquet. The relevant conduct at issue is using a cell phone for a work-related purpose while driving home from work.

Neither driving, nor using a personal cell phone while driving home, was an integral part of the work Horsford was hired to perform as a banquet manager. Unlike the traveling sales manager in *Ellender v. Neff Rental, Inc.*, 965 So. 2d 898, 900 (La. Ct. App. 2007), who used his car as a mobile office, the facts of this case show that making work-related calls while driving was not central to the kind of work Horsford performed as a banquet manager. Even if Horsford was motivated to further his employer's interests when he placed the phone call to his employer at about 9:14 p.m., his decision to do so by using his personal cell phone while driving his personal vehicle on his way home was for his own convenience. Similar to the employee in *Allan* who lost his keys, Horsford's conduct was not a risk incident to the enterprise of running a hotel. Rather, driving while using a cell phone was an aspect of his operation of

his personal motor vehicle on his commute home. The cost of negligence in such circumstances should be imposed on the owner or operator of the vehicle—not the employer.

For these reasons, the trial court properly ruled that the first prong of *Sussman* was not satisfied, and the summary judgment may be affirmed on this basis alone.[1] Crestline had no ability to control how Horsford used his cell phone in his personal car and did not hire him to drive or to perform the kind of work where using a cell phone while driving would be a practical necessity.

Affirmed.

KLINGENSMITH, C.J., and LEVINE, J., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

[1] Because we find that the first *Sussman* prong was not satisfied, it is not necessary to decide the remaining aspects of the *Sussman* test.