STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2021 CA 0517

JMT.
PMC by JEW

KENNETH BERTHELOT

VERSUS

RUSSELL INDOVINA, PROGRESSIVE SECURITY INSURANCE COMPANY, AND PRO-MAG INSPECTIONS, L.L.C.

JEW

Judgment Rendered: DEC 22 2021

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Appealed from the
32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Case No. 174356

The Honorable Timothy C. Ellender, Jr., Judge Presiding

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

THERIOT, J.

In this personal injury suit arising from an automobile accident, the defendant appeals a trial court judgment granting summary judgment in favor of the plaintiff on the issue of vicarious liability. We reverse.

FACTS AND PROCEDURAL HISTORY

This suit arose from an automobile accident that occurred in Terrebonne Parish on April 14, 2014, wherein Russell Indovina rear-ended the vehicle operated by Kenneth Berthelot. On April 14, 2015, Berthelot filed a petition for damages against Indovina and Indovina's liability insurer, Progressive Security Insurance Company. Berthelot later filed a First Supplemental and Amending Petition on February 1, 2016 to add Indovina's employer, Pro-Mag Inspections, L.L.C. ("Pro-Mag"), as a defendant.[1] In this petition, Berthelot alleged that Indovina was in the course and scope of his employment with Pro-Mag at the time of the accident because he was driving to pick up work supplies. On March 19, 2018, Bertholot filed a Second Supplemental and Amending Petition to add Pro-Mag's liability insurer, Houston Specialty Insurance Company, as a defendant. Pro-Mag's environmental excess liability insurer, Crum & Forster Specialty Insurance Company, intervened in the suit on September 17, 2018, because Berthelot sought damages in excess of Pro-Mag's primary insurance policy limits with Houston Specialty.

On August 3, 2018, Berthelot filed a motion for summary judgment on the issue of whether Indovina was in the course and scope of his employment with Pro-Mag at the time of the accident. In support of its motion, Berthelot filed excerpts from Indovina's January 18, 2016 deposition; Indovina's pay stub showing that he received a car allowance in addition to his salary; Indovina's time

[1] Berthelot had previously settled with Progressive and its insured, Russell Indovina (in his personal capacity only), reserving the right to proceed against Indovina in his capacity as insured under any other insurance policy or in his capacity as employee or agent of any person or entity, as well as against any other parties.

card showing when he clocked in and out on the date of the accident; and a map showing the locations of Indovina's work site, Pro-Mag's shop, and Indovina's house.

In his January 18, 2016 deposition, Indovina testified that although he was employed by Pro-Mag, he worked off-site at Trinity Tool Rentals ("Trinity"). Indovina seldom reported to Pro-Mag's "shop" on Hollywood Road in Houma; rather, he reported directly to and from Trinity's facility on West Park Avenue in Gray each day. Sometimes, however, when he ran out of supplies, he would go to Pro-Mag's shop on his way to or from work to restock his supply bin at Trinity. On the day of the accident, Indovina left work at the Trinity facility at the end of the workday and was on his way to the Pro-Mag shop to pick up supplies to restock his bin when the collision happened. The map filed in evidence showed that at the time of the accident, Indovina had passed up the turn to go to his house and was nearing the location of the Pro-Mag shop. According to Indovina, his employers at Pro-Mag were aware that he would use his personal vehicle to go to the Pro-Mag shop to restock from time to time, and he was paid a flat monthly vehicle allowance in addition to his salary for that reason.

On August 17, 2018, Pro-Mag filed an opposition to the motion, in support of which it filed excerpts from Indovina's January 18, 2016 deposition and from the August 3, 2018 videotaped deposition of Pro-Mag's designated representative, Jeremy Rougeau.

Jeremy Rougeau testified that only "mobile unit" employees travel to the Pro-Mag shop to restock their own supplies. He defined mobile unit employees as employees who drive company trucks out to jobs to perform inspections. Indovina was not a mobile unit employee. He was a "stationary" employee, meaning that he reported straight to the job site and worked at the same job site (Trinity) all of the

time.[2] Instead of a company truck, stationary employees have a large cargo box that remains at the job site. When stationary employees need additional supplies for their cargo box, they are to call Pro-Mag either for someone (a mobile unit employee, a general manager, Rougeau, or a sales representative) to bring it to them during normal business hours or for Pro-Mag's suppliers to deliver it directly to the job site. Rougeau was aware that Indovina used his personal vehicle to drive to Pro-Mag on occasion as well as to Trinity, but he testified that if Indovina was traveling to Pro-Mag to restock supplies at the time of the accident, he was doing it against company policy. He testified that Indovina did not receive the car allowance for the purpose of traveling to Pro-Mag to restock. According to Rougeau, the car allowance was "supplemental pay." Rougeau explained that Indovina had been with the company for a long time, and he wanted to give him a raise, but stationary employees are paid less than mobile unit employees. The car allowance was simply a mechanism to pay Indovina more than a stationary employee would typically make.

On August 22, 2018, Berthelot filed a reply memorandum in support of his motion. Despite the prohibition in La. C.C.P. art. 966(B)(3)[3] against filing additional documents with the reply memorandum, Bertholot filed the following with his reply: excerpts from Indovina's January 18, 2016 deposition, which had already been filed with the motion for summary judgment; additional excerpts from Rougeau's deposition, in which Rougeau states that he has no evidence that

[2] On rare occasions when there was no work at the Trinity site, Indovina would be picked up by a mobile unit employee to go to jobs with them in the mobile unit.

[3] Louisiana Code of Civil Procedure article 966(B)(3) provides that "[n]o additional documents may be filed with the reply memorandum." However, La. C.C.P. art. 966(D)(2) provides that the court "shall consider any documents to which no objection is made." As no objection was made to the documents attached to Berthelot's reply memorandum, we will consider these documents filed with the reply memorandum. See *Jackson v. Board of Supervisors of Louisiana State University*, 2019-0459, p. 4 (La.App. 1 Cir. 1/9/20), 294 So.3d 1054, 1057 n.3.

Indovina was not in fact traveling to Pro-Mag at the time of the accident; and correspondence between the parties.[4]

Because Indovina's January 18, 2016 deposition was taken prior to the addition of defendants Pro-Mag, Houston Specialty Insurance Company, and Crum & Forster Specialty Insurance Company to the suit and prior to the addition of allegations that Indovina was in the course and scope of his employment at the time of the accident, an additional deposition of Indovina was taken on September 26, 2018. Following receipt of the transcript of this deposition, Pro-Mag filed a supplemental opposition to the motion for summary judgment and attached excerpts from the September 26, 2018 deposition of Indovina. There were no objections to the supplement.

In his September 26, 2018 deposition, Indovina gave a slightly different version of his testimony about where he was going at the time of the accident. Indovina testified that since his mother's death in 2013, he drove to visit his father, who was living with Indovina's brother, every day after work. On the date of the accident, he had completed his workday, and planned to go to Pro-Mag to restock supplies and also to go visit his father. Indovina testified that he had not yet decided where to stop first when the accident occurred, and the location of the accident was before he reached his turn for either destination. Indovina testified that regardless of the Pro-Mag policy on restocking, "very seldom" would he call and have supplies sent to the Trinity facility; he generally would drive to the Pro-Mag shop and pick them up himself. However, he was not paid any more to drive to Pro-Mag and restock his own supplies; he received the additional $400.00 a month regardless of whether he used his car for work, and the car allowance was simply a mechanism to increase his salary. Indovina testified that he was finished with work for the day when he left Trinity's facility. Although his time sheet

[4] This correspondence relates to an argument regarding the timeliness of the motion for summary judgment and is not relevant to this appeal.

shows that he clocked out after the accident occurred, that was because the time clock was a new procedure and he often forgot to clock in and out. He remembered after the accident that he had not clocked out that day, so he clocked out from the application on his phone when he remembered. He did not report the accident to his employer after it occurred because he did not think he was working at the time of the accident. He only informed Rougeau when he discovered that a vicarious liability claim was going to be made.

After a hearing on the motion for summary judgment, the trial court found that, considering the location of the accident in relation to Pro-Mag's office, as well as the fact that Indovina was performing a work-related task that was in furtherance of his employer's interests at the time of the accident, Indovina was within the course and scope of his employment with Pro-Mag at the time of the accident. Accordingly, the court granted Berthelot's motion for summary judgment. A judgment was signed in accordance with the ruling of the court, and Pro-Mag, Houston Specialty Insurance Company, and Crum & Forster Specialty Insurance Company appealed.[5]

On appeal, the defendants argued that the trial court erred in finding that Indovina was in the course and scope of his employment at the time of the accident, because employees are not in the course and scope of employment when coming to or going from work. The defendants also argued that the trial court should have denied summary judgment on the grounds that genuine issues of material fact remain.

[5] The trial court's original judgment on the motion for summary judgment, signed on November 8, 2018, was appealed, but the appeal was dismissed by this court because the judgment was ambiguous and lacked appropriate decretal language. *Berthelot v. Indovina*, 2019-0821 (La.App. 1 Cir. 2/21/20), 311 So.3d 1139, *reh'g denied* (June 10, 2020), *writ denied*, 2020-00921 (La. 11/24/20), 305 So.3d 106. The trial court signed a new judgment on December 15, 2020, and this appeal was taken from that judgment. The December 15, 2020 judgment was properly certified as final under La. C.C.P. art. 1915(B). See *R.J. Messinger, Inc. v. Rosenblum*, 2004-1664 (La. 3/2/05), 894 So.2d 1113.

DISCUSSION

Summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action. The procedure is favored and shall be construed to accomplish these ends. La. C.C.P. art. 966(A)(2). After an opportunity for adequate discovery, summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3).

Appellate courts review summary judgments de novo, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. *In re Succession of Beard*, 2013-1717, p. 10 (La.App. 1 Cir. 6/6/14), 147 So.3d 753, 759-60.

In ruling on a motion for summary judgment, the court's role is not to evaluate the weight of the evidence or to make a credibility determination, but instead to determine whether or not there is a genuine issue of material fact. See *Hines v. Garrett*, 2004-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765 (per curiam). A genuine issue is one as to which reasonable persons could disagree. However, if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. *Hines*, 2004-0806 at p. 1, 876 So.2d at 765-66. A fact is "material" when its existence or nonexistence is essential to the plaintiff's cause of action under the applicable theory of recovery. *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512 (La. 7/5/94), 639 So.2d 730, 751. Any doubt as to a dispute regarding an issue of material fact must be resolved against granting the motion and in favor of a trial on the merits. *Id.*

The burden of proof on a motion for summary judgment rests with the mover. La. C.C.P. art. 966(D)(1). If the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the

mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense. Rather, the mover must point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1). Although factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, mere conclusory allegations, improbable inferences, and unsupported speculation will not support a finding of a genuine issue of material fact. *Guillory v. The Chimes*, 2017-0479, p. 4 (La.App. 1 Cir. 12/21/17), 240 So.3d 193, 195.

Whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. *Larson v. XYZ Insurance Company*, 2016-0745, p. 7 (La. 5/3/17), 226 So.3d 412, 417.

In Louisiana, the vicarious liability of employers, also known as the doctrine of *respondeat superior*, is based upon Louisiana Civil Code article 2320, which states that "[m]asters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed." *Macaluso v. Travelers Casualty and Surety Company*, 2010-1478, p. 5-6 (La.App. 1 Cir. 2/23/11), 59 So.3d 454, 459. In applying this article, it has been held that an employer's liability for its employee's conduct extends only to such tortious conduct that is within the course and scope of employment. *Orgeron v. McDonald*, 93-1353, p. 4 (La. 7/5/94), 639 So.2d 224, 226. Generally, an employee's conduct is within the course and scope of his employment if the conduct is of the kind that he is employed to perform, occurs substantially within the authorized limits of time and space, and is activated at least in part by a purpose to serve the employer. An employer is thereby responsible for the

negligent acts of its employee when the conduct is so closely connected in time, place, and causation to the employment duties of the employee that it constitutes a risk of harm attributable to the employer's business. *Orgeron*, 93-1353 at p. 4, 639 So.2d at 226-27.

Normally, going to and from work is not an employment function for which the employer should be held liable. *Holt v. Torino*, 12-1579, p. 6 (La.App. 1 Cir. 4/26/13), 117 So.3d 182, 186. The rationale of this principle is that an employee usually does not begin work until he reaches his employer's premises. Therefore, unless the employee has a duty to perform a service or task en route, the employee's commute to and from work is usually considered outside the course and scope of employment. *Richey v. Miller*, 2017-0462, pp. 9-10 (La.App. 1 Cir. 3/29/18), 247 So.3d 964, 970.

An employee on an employment-related errand may be within the course and scope of his employment yet step out of that realm while engaging in a personal mission. The mere fact that an employee is performing a personal errand while on an employment-related errand does not automatically compel the conclusion that the deviation removes the employee from the course and scope of employment. Generally, an identifiable deviation from a business trip for personal reasons takes the employee out of the course of employment until the employee returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial. *Timmons v. Silman*, 1999-3264, pp. 4-5 (La. 5/16/00), 761 So.2d 507, 510-511. In determining whether a deviation was substantial or insubstantial, we look at all the facts and circumstances of the deviation, including such illustrative factors as when and where, in relation to the business errand, the employee deviates from the employment-related errand and commences with his personal errand, the temporal and spacial boundaries of the deviation, the nature of the employee's work, the additional risks created by the deviation, and the

surrounding circumstances. This list of considerations is non-exhaustive, and a court should carefully consider all the facts unique to the case before it. *Id.*

Reviewing the evidence before the court on the motion for summary judgment, it is clear that genuine issues of material fact remain as to whether Indovina was on an employment-related errand at the time of the accident. Indovina testified that he had not decided where he was going before he got in the accident, although he intended to go to his employer's shop for a work-related purpose at some point. It seems undisputed that Indovina was motivated by a purpose to serve his employer in making the trip to the shop. However, given Rougeau's testimony, there is conflicting evidence as to whether restocking his own supplies was the kind of work that Indovina was employed to perform, as well as whether his after-hours trip to the shop to restock was conduct "substantially within the authorized limits of time and space." Further, even if Indovina was on an employment-related errand, there are genuine issues of material fact remaining as to whether he deviated from his employment-related errand prior to the accident, and if so, whether such a deviation was "substantial" so as to remove him from the course and scope of employment. Indovina testified that he planned to visit his father at some point, as he did every day after work, but he had not yet decided where he was going first, nor had he reached his turn for either destination at the time the accident occurred. A determination that either Indovina planned to go to Pro-Mag's shop first or that a trip to his father's house first was not a substantial deviation, requires weighing evidence or assessing credibility, either of which is inappropriate on a motion for summary judgment. See *Smith v. Our Lady of the Lake Hospital, Inc.*, 93-2512 (La. 7/5/94), 639 So.2d 730, 751. Because we have found that genuine issues of material fact remain as to whether Indovina was in the course and scope of his employment at the time of the accident, summary judgment on that issue was inappropriate.

CONCLUSION

For the reasons set forth herein, the December 15, 2020 judgment of the trial court, which granted summary judgment in favor of plaintiff, Kenneth Berthelot, and against defendants, Pro-Mag Inspections, L.L.C., Houston Specialty Insurance Company, and Crum & Forster Specialty Insurance Company, is reversed. Costs of this appeal are assessed to plaintiff, Kenneth Berthelot.

REVERSED.