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DISTRICT II

November 24, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2020AP1489 Carlos Flores v. Allstate Insurance Company (L.C. #2019CV830)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Carlos Flores, Miriam Garcia, Roberto Flores, and Francisco Flores (collectively, "Appellants") appeal from the Kenosha County Circuit Court order granting summary judgment to Case New Holland Industrial Inc. (hereinafter "Case New Holland"). Appellants filed suit against Paul-Aramis Deleanu,[1] an employee of Case New Holland, following a car accident that occurred when Deleanu was driving home after attending a work meeting at a location different than his regular workplace. Appellants allege the circuit court erred in concluding Deleanu was not acting within the scope of his employment, thereby eliminating any vicarious liability of Case New Holland, and in dismissing Case New Holland from the lawsuit. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[2] We affirm.

Deleanu is an employee of Case New Holland. His regular office was in Racine, and his "second office" was in Burr Ridge, Illinois. Until March 2019, Deleanu commuted to his second office in Burr Ridge every Monday. The rest of the week he worked in his Racine office. Deleanu had a cubicle with his name on it in the Burr Ridge office and staff who worked for him when he was there. On May 23, 2019, Deleanu drove from his home in Kenosha to the Burr Ridge office for a meeting. He drove his own car, he took his regular route, and he did not seek reimbursement for gas or mileage because he viewed this as his work commute. Deleanu had the option of attending the meeting by teleconference but decided to attend in person because his manager's supervisor from Italy, Roberto Parola, would be in Burr Ridge for the meeting. After the meeting concluded, Deleanu remained in the Burr Ridge office working for three more hours. After

[1] The record contains multiple spellings of Deleanu's name. We adopt the spelling used by Case New Holland.

[2] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Deleanu completed his work for the day, Parola asked Deleanu if he could drop him off at Chicago O'Hare Airport. Deleanu agreed to do this favor as the airport was on his way home.

When Deleanu was about three or four miles from his home, he rear-ended another vehicle, pushing it into oncoming traffic where it collided with the Appellants' vehicle. Appellants filed a Complaint, which was later amended, alleging that Case New Holland was vicariously liable for Deleanu's negligence because Deleanu was acting within the scope of his employment at the time of the accident.

Case New Holland filed a motion for summary judgment, asserting that an employee with a fixed placed of employment is not acting within the scope of employment while driving to and from work. It relied on ***DeRuyter v. Wisconsin Electrical Power Co.***, 200 Wis. 2d 349, 546 N.W.2d 534 (Ct. App. 1996), which held "that an employee is acting within the scope of his or her employment while driving to or from work only if the employer exercises control over the method or route of the employee's travel." ***Id.*** at 354-55.

Appellants filed a cross-motion for partial summary judgment, asking the circuit court to conclude that Deleanu was not acting within the scope of his employment at the time of the accident under the theory that Deleanu was not a *commuting* employee when he drove to Burr Ridge, but rather a *travelling* employee because he was driving to a location other than his regular office. Accordingly, Appellants asked the circuit court to conclude Deleanu acted within the scope of his employment as a travelling employee under the travelling employee cases of ***Brown v. Acuity***, 2013 WI 60, 348 Wis. 2d 603, 833 N.W.2d 96, and ***Murray v. Travelers Insurance Co.***, 229 Wis. 2d 819, 601 N.W.2d 661 (Ct. App. 1999).

The circuit court, relying on Deleanu's deposition testimony, concluded that as an employee of Case New Holland, Deleanu had "two offices"—one in Racine and the second in Burr Ridge. It held this case was controlled by ***DeRuyter*** and granted summary judgment for Case New Holland and thereafter dismissed it from the case. Appellants appealed. The circuit court proceedings are on hold pending this appeal.

We review the grant of summary judgment de novo. ***Village of Slinger v. Polk Properties, LLC***, 2021 WI 29, ¶6, 396 Wis. 2d 342, 957 N.W.2d 229. Summary judgment methodology is well-known and need not be repeated here. *See* ***Tews v. NHI, LLC***, 2010 WI 137, ¶41, 330 Wis. 2d 389, 793 N.W.2d 860. We apply the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987); WIS. STAT. § 802.08(2).

This case presents a single issue: whether Case New Holland may be held vicariously liable for the Appellants' injuries allegedly caused by Deleanu when he was driving home from the employer's Burr Ridge office. Vicarious liability exists only if Deleanu was acting within the scope of his employment at the time of the accident. ***DeRuyter***, 200 Wis. 2d at 360-62. In deciding this issue, we must first identify whether Deleanu is an employee who has a fixed place of employment, i.e., a "commuting" employee, or whether Deleanu has no fixed place of employment, i.e., a "travelling" employee. Wisconsin cases identify a different "scope of employment" test depending upon whether the employee is commuting to a regular, fixed place of employment, *see* ***id.*** at 361 (citing ***Geldnich v. Burg***, 202 Wis. 209, 210, 231 N.W. 624 (1930) (getting himself to work is the business of the employee)), or whether the employee is instead a travelling employee without any regular place of employment, *see* ***Brown***, 348 Wis. 2d 603, ¶¶32, 36 (recognizing that courts apply a "different analysis from the one set forth in ***DeRuyter***" when an "employee does not have a fixed place of employment" and adopting the ***Murray*** test of whether

the employee's travel "was actuated by a purpose to serve his employer when the accident occurred.").

The ***DeRuyter*** line of cases use an "employer-control" test: the employee is acting within the scope of "employment while driving to or from work only if the employer exercises control over the method or route of the employee's travel." ***DeRuyter***, 200 Wis. 2d at 354-55. The ***Brown***/***Murray*** cases involve employees who do not have a fixed work location—called "travelling employees," who, at the request of the employer, must travel to different locations each day to perform their work. ***Brown***, 348 Wis. 2d 603, ¶¶2, 9, 11, 32, 35-36 (firefighters who travel to different locations); ***Murray***, 229 Wis. 2d at 828 (physical therapist who travelled to individual clients' homes). In travelling employee cases, the test to decide whether an employee is acting within the scope of employment while driving to work focuses on whether the employee is "actuated by a purpose to serve his employer." ***Fischer v. United States***, 996 F. Supp. 2d 724, 729 (W.D. Wis. 2014) (citing ***Brown***, 348 Wis. 2d 603, ¶32; ***Murray***, 229 Wis. 2d at 828).

The circuit court held the facts in this case were "identical" to ***DeRuyter***. We agree that this case is controlled by ***DeRuyter***, which involved an employee who was assigned to "Wisconsin Electric's Kenosha service center." ***DeRuyter***, 200 Wis. 2d at 357. The employer later required the employee to attend a mandatory four-day vocational training session at the employer's West Allis training center. ***Id.*** While driving to the training center, the employee caused a tanker-truck to jackknife, roll down an embankment, and burst into flames—killing the tanker's driver. ***Id.*** at 355-56. In the civil suits that followed, the issue arose as to whether the employee was acting within the scope of his employment while driving to the training center so as to trigger vicarious liability of the employer. ***Id.*** at 356.

The circuit court concluded the employee was on a "special mission" while driving to the training session and found the employee to be acting within the scope of employment. ***Id.*** at 355. The court of appeals reversed based on its application of the "firmly entrenched" "employer-control test" and its rejection of a "special mission" exception. ***Id.*** at 355, 360-61. The court of appeals acknowledged that when "an employee works for another at a given place of employment … it is the business of the employee to present himself at the place of employment, and the relation of master and servant does not exist while he is going between his home and place of employment." ***Id.*** at 361 (citing ***Geldnich***, 202 Wis. at 210). The ***DeRuyter*** court applied the "employer-control" test and concluded the employer "did not exercise control over [the employee's] route or method of travel, and thus was not vicariously liable for his alleged negligence." ***Id.*** at 367.

It is undisputed here that Case New Holland "did not exercise control over" Deleanu's "route or method of travel" on the date of the accident. The record reflects that before March 2019, Deleanu had two fixed, regular places of employment. His main office was in Racine, and his Monday office was in Burr Ridge. He had a cubicle in both offices with his name on it. He had staff who assisted him at Burr Ridge. He regularly commuted to both places in his own car without Case New Holland exercising any control over the method or route of his travel.

Appellants emphasize that after March 2019, Deleanu was no longer commuting regularly to Burr Ridge, and therefore that location would not qualify as his fixed, regular place of employment. Eliminating Burr Ridge as Deleanu's regular Monday office did not transform Deleanu into a travelling employee. Deleanu still had a fixed, regular place of employment. He was still a commuting employee, and it was still his business "to present himself at the place of employment." When an employee has a fixed, regular place of employment but is required by an employer to drive to a secondary employer office for a particular event, the employer will only be

vicariously liable for the employee's negligence *if* the employer "exercise[d] control over the method or route of the employee's travel" to the secondary location. *See* ***id.*** at 354-55. That simply was not the case for Deleanu. Deleanu testified he drove his personal car and took his regular route to Burr Ridge using the GPS in his car. Case New Holland did not provide him with directions or a map or otherwise instruct him as to how to drive to or from Burr Ridge. The record demonstrates Case New Holland was not involved in controlling Deleanu's commute, and therefore Deleanu was not acting within the scope of his employment at the time of the accident. Case New Holland cannot he held vicariously liable for any alleged negligence Deleanu caused to Appellants.[3]

Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[3] Appellants also argue Deleanu was a travelling employee because his job involved significant travel away from his regular office. In support of this argument, Appellants cite ***Barragar v. Industrial Commission of Wisconsin***, 205 Wis. 550, 238 N.W. 368 (1931). ***Barragar*** is a worker's compensation case and is therefore inapplicable here. "[T]he principles of the common-law doctrine of *respondeat superior* [are] different from those applicable to workmen's compensation cases." *See* ***Kamp v. Curtis***, 46 Wis. 2d 423, 431, 175 N.W.2d 267 (1970).