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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

INDONEISIA PETERSON,

Appellant,

v.

CISCO SYSTEMS, INC.,

Appellee.

Case No. 2D20-244

Opinion filed May 28, 2021.

Appeal from the Circuit Court for Hillsborough County; Caroline Tesche Arkin, Judge.

Luis G. Figueroa and Dennis Hernandez of Dennis Hernandez & Associates, P.A., Tampa, for Appellant.

Benjamine Reid of Carlton Fields, Miami, for Appellee Cisco Systems, Inc.

LaROSE, Judge.

Indoneisia Peterson sued Cisco Systems, Inc., under a theory of respondeat superior for personal injury damages caused by the allegedly negligent acts of Cisco's employee, Mohamed Ibrahim. See Cintron v. St. Joseph's Hosp., Inc., 112 So. 3d 685, 686 (Fla. 2d DCA 2013) ("[R]espondeat superior makes employers liable for the negligence of their employees for wrongful acts committed within the course and scope of their employment."). She now appeals the final summary judgment entered

against her. We have jurisdiction.[1] See Fla. R. App. P. 9.030(b)(1)(A) (providing jurisdiction over appeals from final orders). Because Mr. Ibrahim was not acting within the course and scope of his employment with Cisco when the car he was driving collided with the one driven by Ms. Peterson, we affirm.

I. Background

The parties presented these undisputed facts at the summary judgment hearing: Mr. Ibrahim is a Cisco engineer. Normally, he works at Cisco's facilities in Virginia. Cisco sent him to work, temporarily, on-site for a Tampa-based customer. For the duration of his stay in Tampa, Cisco paid for his rental car and hotel room. Mr. Ibrahim was driving the rental car to the work site from the hotel when the collision occurred.

Cisco moved for summary judgment, positing that a person driving to or from work is not within the course and scope of his employment. Thus, Cisco should not be held liable for Mr. Ibrahim's allegedly negligent conduct. Ms. Peterson countered that because Mr. Ibrahim was on an out-of-state business trip for Cisco, her case was different from the mine-run cases that Cisco relied upon in its summary judgment motion.

Accepting Cisco's theory, the trial court granted Cisco's motion. The trial court subsequently entered its final judgment from which Ms. Peterson now appeals.

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[1]The final summary judgment related solely to Cisco. Our record reflects that prior to the entry of judgment against her, Ms. Peterson had voluntarily dismissed with prejudice her negligence suit against Mr. Ibrahim.

II. Discussion

A. Standard of Review & Governing Law

"Where there are no factual disputes, whether an employee is acting within the course and scope of his employment is a question of law." Adams v. Mitchell G. Hancock, Inc., 74 So. 3d 1113, 1114 (Fla. 5th DCA 2011) (citing Sussman v. Fla. E. Coast Props., Inc., 557 So. 2d 74, 76 (Fla. 3d DCA 1990)). "The standard of review governing a trial court's ruling on a motion for summary judgment posing a pure question of law is de novo." Major League Baseball v. Morsani, 790 So. 2d 1071, 1074 (Fla. 2001). Further, "if there is no genuine issue of material fact, a summary judgment is proper only if the moving party is entitled to a judgment as a matter of law." Est. of Githens ex rel. Seaman v. Bon Secours-Maria Manor Nursing Care Ctr., Inc., 928 So. 2d 1272, 1274 (Fla. 2d DCA 2006) (quoting Maynard v. Household Fin. Corp. III, 861 So. 2d 1204, 1206 (Fla. 2d DCA 2003)).

"In Florida, an employer is vicariously liable for an employee's tortious conduct where the conduct occurs within the scope of the employment." Fields v. Devereux Found., Inc., 244 So. 3d 1193, 1196 (Fla. 2d DCA 2018) (citing Garcia v. Duffy, 492 So. 2d 435, 438 (Fla. 2d DCA 1986)). An employee's "[c]onduct is within the scope of employment if it occurs substantially within authorized time and space limits, and it is activated at least in part by a purpose to serve the master." Hennagan v. Dep't of Highway Safety & Motor Vehicles, 467 So. 2d 748, 751 (Fla. 1st DCA 1985).

However, "the law is well established that an employee driving to and from work is not within the scope of employment so as to impose liability on the employer." Hernandez v. Tallahassee Med. Ctr., Inc., 896 So. 2d 839, 843 (Fla. 1st DCA 2005) (first citing Foremost Dairies, Inc., of the S. v. Godwin, 26 So. 2d 773 (Fla. 1946); and

then citing Freeman v. Manpower, Inc., 453 So. 2d 208, 209 (Fla. 1st DCA 1984)); see, e.g., Foremost Dairies, Inc., 26 So. 2d at 774 (holding that employee's negligent operation of the car was not attributable to the employer because the employee was "*on his way to work* when the collision occurred"). This rule is colloquially referred to as the "going and coming" rule. Swartz v. McDonald's Corp., 788 So. 2d 937, 942 (Fla. 2001) ("The 'going and coming' rule provides that injuries sustained while traveling to or from work do not arise out of and in the course of employment and, therefore, are not compensable.").

B. Analysis

Ms. Peterson's arguments conflate workers' compensation law and tort law. Florida workers' compensation law is not bounded by the "going and coming" rule in the context of injury disputes between an employer and an employee. Rather, it recognizes the "traveling employee" rule. This court has explained that "an employee whose work entails travel away from the employer's premises is within the course of his employment at all times during the trip other than when there is a distinct departure for a non-essential personal errand." Leonard v. Dennis, 465 So. 2d 538, 540 (Fla. 2d DCA 1985) (quoting N. & L. Auto Parts Co. v. Doman, 111 So. 2d 270, 271-72 (Fla. 1st DCA 1959)). Ms. Peterson's reliance on the "traveling employee" rule is misplaced. This rule is distinct from the "going and coming" rule applied in negligence cases involving third parties. As we summarized in Fierro v. Crom Corp., 617 So. 2d 379, 379-80 (Fla. 2d DCA 1993),

> the "traveling employee" exception . . . applies . . . only in workers' compensation cases in regard to torts arising out of incidents occurring when an employee is away from home. We decline to extend that exception provided in workers' compensation cases for the "traveling employee" to permit

> an action against an employer for his traveling employee's negligence resulting in injuries to third parties.

As Fierro teaches, Mr. Ibrahim was not within the course and scope of his employment. Yet, Ms. Peterson contends that this case presents unresolved fact issues that require jury consideration. We cannot agree.

1. Out-of-State and Temporary Residence Arguments

Ms. Peterson emphasizes that Mr. Ibrahim was on his way from a hotel to a remote work site when the collision occurred. This distinction creates too far a stretch for the "going and coming" rule. Ms. Peterson's expansive view of respondeat superior would subject Cisco to liability for any tortious conduct committed by Mr. Ibrahim during his entire trip. No relevant case law brought to our attention supports this view. We cannot agree that an employer's vicarious liability to a third party depends upon whether the employee drives to the worksite from a temporary residence as opposed to his usual abode. See id. (refusing to draw a distinction between employees who left home to go to work and those that left from a temporary residence in the context of respondeat superior). That Mr. Ibrahim was working out of state at the time of the collision does not automatically change his morning commute into working within the regular scope of his employment.

Ms. Peterson also maintains that Mr. Ibrahim would not have been in Tampa but for Cisco sending him. We are unpersuaded. In Jones v. Latex Construction Co., 460 Fed. Appx. 842, 843-45 (11th Cir. 2012), the Eleventh Circuit held that an employee "headed to work" at the time of a car accident was not acting within the course and scope of his employment so as to impute liability to his employer. Id. (holding that employer was not liable for employee working out of state, driving a

truck leased for him by his employer when accident occurred). There is no dispute that Mr. Ibrahim was driving to work when the collision occurred. Under the "going and coming" rule, Ms. Peterson cannot foist liability on Cisco.

2. Middle District of Florida Case

Ms. Peterson relies on Williams v. Benway, No. 8:11-CV-1840-T-23TGW, 2012 WL 260637 (M.D. Fla. Jan. 30, 2012), contending that it is factually indistinguishable from the present case. Williams is not binding, and its facts are distinct in critical ways. For example, the employer, there, conceded that the employee was acting within the course and scope of her employment when the accident occurred. Id. at *1. Further, Williams applied the Federal Tort Claims Act because the case involved a federal government employee. Id. at *1, *3. The present case involves the common law of respondeat superior and the well-established "going and coming rule." Therefore, Ms. Peterson's reliance on Williams is not compelling.

3. Ownership of Rental Vehicle

Finally, Ms. Peterson argues for the first time on appeal that Cisco owned the rental vehicle. Our record reflects scant facts to support this remarkable proposition. More fundamental, she did not present this argument to the trial court. See Tillman v. State, 471 So. 2d 32, 35 (Fla. 1985) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.").

Ms. Peterson argues that absent a trial, she did not waive the issue. However, a summary judgment hearing presents a sufficient opportunity for the parties to preserve their issues and objections for appeal. See, e.g., U.S. Bank N.A. for RFMSI

2006-S10 v. Adams, 219 So. 3d 211, 213 (Fla. 2d DCA 2017) ("The Adamses assert that U.S. Bank failed to preserve [its argument that lack of notice under section 559.715, Florida Statutes (2013), was legally insufficient to support summary judgment] for review by not adequately addressing it at the summary judgment hearing. We disagree. Although U.S. Bank focused its argument at the hearing on the sufficiency of the Adamses' affidavits and made limited mention of section 559.715, it specifically argued that section 559.715 does not create a condition precedent in its memorandum in opposition to the Adamses' motion for summary judgment and in its motion for rehearing. At the summary judgment hearing, the Adamses addressed this issue and attempted to rebut it. Thus, U.S. Bank's argument against the application of section 559.715 was before the court, and we reject the Adamses' contention that U.S. Bank failed to preserve the issue."). Thus, we decline to address the merits of the rental car ownership issue.

III. Conclusion

Because Mr. Ibrahim was commuting to the work site when the collision occurred, he was not acting within the course and scope of his employment. We, therefore, affirm the final summary judgment entered in favor of Cisco.

Affirmed.

KELLY and ATKINSON, JJ., Concur.