

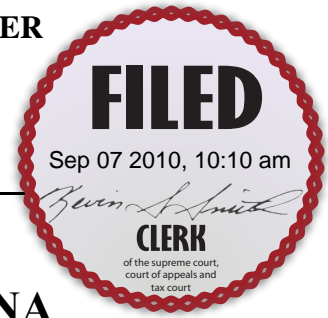
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**IN THE
COURT OF APPEALS OF INDIANA**

MARK HENDRICKSON, as Pers. Rep. of the)
Estate of NOAH JAMES DREBLOW, Deceased,)
And ERICA J. DREBLOW, Individually and as)
Surviving Parent and Guardian of TYLER J.)
DREBLOW, a Minor, and DEREK J. DREBLOW,)
Individually,)

Appellants,)

vs.)

JOSEPH POTETZ, NATALIE POTETZ, and)
COINMACH HOLDINGS, LLC,)

Appellees.)

No. 87A01-1002-CT-111

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Robert R. Aylsworth, Judge
Cause No. 87D02-0808-CT-361

September 07, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Mark Hendrickson, as personal representative of the Estate of Noah Dreblow; Derek Dreblow, individually; Erica Dreblow, individually; and Tyler Dreblow, a minor, by his mother and natural guardian, Erica Dreblow (collectively, the “Dreblows”), appeal the trial court’s entry of summary judgment in favor of Coinmach Holdings, LLC (“Coinmach”).

We affirm.

ISSUE

Whether the trial court erred in granting summary judgment to Coinmach.

FACTS

Joseph Potetz began working for Coinmach in April of 2004.¹ Potetz’s duties included collecting cash from Coinmach’s coin-operated washing machines and dryers located throughout southwest Indiana. Potetz generally worked from 7:30 a.m. to 4:00 p.m., Monday through Friday.

¹ Apparently, Coinmach was the successor company to a company for which Potetz had worked since 1998.

Coinmach provided Potetz with a company van, which Potetz took home every afternoon after completing his daily route. Coinmach's written policy on the use of company vehicles provided, in part, as follows:

A company vehicle will only be used for business purposes. A company vehicle may not be used for personal purposes before, during, or after work hours

All drivers of a company vehicle must operate and maintain the company vehicle with the utmost care and safety.

. . . .

All employees who are authorized to commute between work and their personal residence with a company vehicle must take the following actions:

[] Park the vehicle in a lighted area in their driveway or as close to their residence as possible.

(App. 133-34). The policy further provided that employees would be subject to discipline if "involved in a vehicle accident or other incident which causes damage to Coinmach property, the property of other individuals and/or bodily injury" (App. 135).

On Friday, May 18, 2007, the Potetzes' daughter, Erica Dreblow, left her sixteen-month-old son, Noah, and his older brother, Tyler, in the care of their grandmother, Natalie Potetz. Another grandson, Christopher, went to the Potetzes' residence later that afternoon.

Potetz arrived home at approximately 4:00 p.m. and parked his van in the driveway, in front of the garage. Potetz typically did not park in front of the garage;

rather, he usually parked behind the garage, “out of the way.” (App. 122). According to Potetz, he “didn’t want [the van] in front of the garage for fear someone would . . . back out of the garage and maybe back into it.” (App. 123). Also, his grandchildren often played on the driveway; he worried about them colliding with the van and “didn’t want basketballs bouncing off of” the van. (App. 123).

Potetz was home for approximately forty-five minutes when Christopher asked him to move the van so he and his friends could play basketball on the driveway. As Potetz was moving the van, he struck Noah. Noah died at the scene.

On August 8, 2008, the Dreblows filed a complaint for wrongful death against the Potetzes and Coinmach, as the owner of the van. On September 19, 2008, Potetz and Coinmach filed an answer and affirmative defenses, including that the Dreblows had failed to state a claim against Coinmach.

On December 17, 2008, Coinmach filed a motion for summary judgment and memorandum in support thereof. Coinmach designated Potetz’s affidavit as evidence. In his affidavit, Potetz averred that “[a]t the time of the accident, [he] was moving the vehicle for [his] own initiative and had no intention to perform any service to Coinmach or on its behalf and was not in the course or scope of [his] employment.” (App. 43). Therefore, “the acts complained of were not in the course and scope of Mr. Potetz’ [sic] employment,” entitling Coinmach to judgment as a matter of law. (App. 38).

The Dreblows filed their response to Coinmach’s motion on August 26, 2009. The Dreblows designated as evidence Coinmach’s policy regarding the use of company

vehicles and portions of Potetz's deposition, wherein he stated that he moved the van from the driveway to make room for the children to play; to protect the children from collisions with the van; and to prevent damage to the van.

The trial court held a hearing on Coinmach's motion on January 13, 2010. On February 9, 2010, the trial court granted Coinmach's motion. On March 9, 2010, the trial court directed entry of final judgment as to Coinmach.

DECISION

When reviewing a grant or denial of summary judgment, our well-settled standard of review is the same as it was for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. *Landmark Health Care Assocs., L.P. v. Bradbury*, 671 N.E.2d 113, 116 (Ind. 1996). Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. Ind. T.R. 56(C); *Blake v. Calumet Const. Corp.*, 674 N.E.2d 167, 169 (Ind. 1996). "A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 318 (Ind. Ct. App. 1991).

All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996). However, once the

movant has carried his initial burden of going forward under Trial Rule 56(C), the nonmovant must come forward with sufficient evidence demonstrating the existence of genuine factual issues, which should be resolved at trial. *Otto v. Park Garden Assocs.*, 612 N.E.2d 135, 138 (Ind. Ct. App. 1993), *trans. denied*. If the nonmovant fails to meet his burden, and the law is with the movant, summary judgment should be granted. *Id.*

“Additionally, when material facts are not in dispute, our review is limited to determining whether the trial court correctly applied the law to the undisputed facts.” *Mills v. Berrios*, 851 N.E.2d 1066, 1069 (Ind. Ct. App. 2006) (quoting *Bennett v. CrownLife Ins. Co.*, 776 N.E.2d 1264, 1268 (Ind. Ct. App. 2002)). We review a question of law de novo. *Id.* “Finally, if the trial court’s grant of summary judgment can be sustained on any theory or basis in the record, we will affirm.” *Beck v. City of Evansville*, 842 N.E.2d 856, 860 (Ind. Ct. App. 2006), *trans. denied*.

The Dreblows allege that Coinmach is liable under the theory of respondeat superior. Specifically, the Dreblows maintain that Potetz was acting within the scope of his employment when he “moved the vehicle at least in part to protect it from damage as he is required by his company to do.” The Dreblows’ Br. at 8.

The general rule is that vicarious liability will be imposed upon an employer under the doctrine of respondeat superior where the employee has inflicted harm while acting “within the scope of employment.” And in order for an employee’s act to fall “within the scope of employment,” the injurious act must be incidental to the conduct authorized or it must, to an appreciable extent, further the employer’s business.

The Restatement of Agency advises that “[a]n employer is subject to vicarious liability for a tort committed by its employee acting within the

scope of employment.” Further, “[a]n employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer’s control. An employee’s act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.”

Barnett v. Clark, 889 N.E.2d 281, 283-84 (Ind. 2008) (internal citations omitted) (emphasis added).

It is possible for an employee to engage in conduct, part of which is within the scope of employment and part of which is not. *Id.* at 284. “[T]he focus must be on how the employment relates to the context in which the commission of the wrongful act arose,” and the nature of the act must, at the very least, be sufficiently associated with the employee’s authorized duties to escape dismissal on summary judgment. *Id.* at 285 (quoting *Stropes v. Heritage House Children’s Ctr.*, 547 N.E.2d 244, 249-50 (Ind. 1989)).

In sum, an employer is liable under respondeat superior: 1) if an employee’s act furthered the employer’s business interest to an appreciable extent, or 2) if an employee’s authorized acts and unauthorized acts are so closely associated that the employee can be said to have acted within the scope of his employment.

Hurlow v. Managing Partners, Inc., 755 N.E.2d 1158, 1163 (Ind. Ct. App. 2001), *trans. denied.*

The facts of this case invite comparison to those cases where an employee has been involved in an accident while driving a company-provided vehicle. Such cases hold that travel to and from work is not considered activity within the scope of employment so

as to hold an employer liable for injury caused by an employee's negligence. See *Biel, Inc. v. Kirsch*, 240 Ind. 69, 161 N.E.2d 617, 618 (1959); *Dillman v. Great Dane Trailers, Inc.*, 649 N.E.2d 665, 667 (Ind. Ct. App. 1995).

In *Biel*, Ethel Biel, the president of Biel, Inc., often drove a company-owned vehicle to and from work. The plaintiff filed an action against Biel, Inc. after Mrs. Biel was involved in a collision while driving to work. In support of the contention that Mrs. Biel was acting within the scope of her employment and authority for and on behalf of Biel, Inc., the plaintiff "insisted that since the corporation had no garage, it got the benefit of having the car which Mrs. Biel used placed at night in her private garage where it was better protected from the weather." 161 N.E.2d at 618.

The Indiana Supreme Court, disagreed, holding as follows:

Such incidental benefits, if any, cannot change a relationship of bailment to one of agency. There is no evidence that at the time of the accident Mrs. Biel was acting within the scope of her employment She was on no errand for the corporation, but on the contrary was on her way to work. Her employment by the corporation had not yet started for the day, so far as the evidence reveals. It is well settled that an employee on his way to work is normally not in the employment of the corporation.

Id.

In *Dillman*, this court reiterated the *Biel*-holding and further explained that "if there are conflicting facts, or conflicting inferences to be drawn from the facts, regarding why the motorist was on the road at the time of the accident, then the scope of employment determination falls upon the fact-finder." 649 N.E.2d at 668. The *Dillman*-court further clarified:

[t]he use of the word ‘normally’ [in *Biel*] merely allows for an exception to the general rule for those instances where the employee is not just going to work, but also performing an errand for or otherwise providing some service or benefit to the company, other than merely showing up for work.

Id. (emphasis omitted).

The facts of this case show that prior to the accident, Potetz had completed his work day and parked his work van in an acceptable parking spot; specifically, he parked in his driveway. At the behest of his grandson, Potetz moved the van from the driveway. He did so to give the children room to play; to prevent injuries to the children; and to prevent damage to the van while the children played.

Even taking the facts most favorable to the Dreblows, we conclude that the act of moving the van cannot be viewed as furthering Coinmach’s business to an appreciable, if any, extent. Furthermore, Potetz clearly was not performing work assigned by Coinmach or engaging in conduct subject to Coinmach’s control when he moved the van.² We therefore cannot say that the facts support a finding that the injurious act was incidental to any authorized conduct or duty. *See Barnett*, 889 N.E.2d at 283-84. Accordingly, we affirm the trial court’s granting of summary judgment in favor of Coinmach.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.

² In fact, moving the van from the driveway could be construed as a violation of Coinmach’s policy, which directed Coinmach employees to park their vehicles “in their driveway or as close to their residence as possible” (App. 134).