NO. COA14-487
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

JAMES PATRICK LOGAN,
Plaintiff,

v.

Guilford County
No. 11 CVS 8678

CHARLES ALBERT MORGAN, and C&W BUS COMPANY, INC., and MORGAN & SONS WEEKEND TOURS, INC.,
Defendants.

Appeal by plaintiff from order entered 24 March 2014 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 9 October 2014.

Benson, Brown & Faucher, PLLC, by Drew Brown and James R. Faucher, for plaintiff-appellant.

Bolster Rogers & McKeown, LLP, by Jeffrey S. Bolster, for defendant-appellee Morgan & Sons Weekend Tours, Inc.

GEER, Judge.

Plaintiff James Patrick Logan appeals from an order granting the motion of defendant Morgan & Sons Weekend Tours, Inc. ("Morgan & Sons") for summary judgment and denying plaintiff's motion for partial summary judgment in this motor

vehicle accident case. Plaintiff primarily argues that he submitted sufficient evidence to give rise to a genuine issue of fact as to whether defendant Charles Albert Morgan, an employee of Morgan & Sons, was acting within the scope of his employment when he collided with plaintiff. Because we find the evidence in this case indistinguishable from that in *Wilkie v. Stancil*, 196 N.C. 794, 147 S.E. 296 (1929), holding that the employer in that case was not liable for his employee's motor vehicle accident, we affirm.

Facts

Mr. Morgan and his wife Wilnette Morgan are the sole officers and shareholders of Morgan & Sons. Morgan & Sons is a charter bus company operating out of Greensboro, North Carolina. Mrs. Morgan serves as Morgan & Sons' vice president and secretary, while Mr. Morgan is the company's president and treasurer. Morgan & Sons parks its buses, when they are not in use or kept by the driver, in the gated lot it owns at 8709 West Market Street in Greensboro, North Carolina ("the West Market Street office"). The West Market Street office premises have an office building and a garage for auto repairs. C&W Motors, another company that the Morgans own that buys and sells cars and buses, shares the use of that property.

Morgan & Sons employs four drivers, although Mr. Morgan also drives when needed. Some, but not all, of the drivers have keys to the gate to the lot where the buses are parked. When a driver does not have a key and needs to get a bus in the morning, it is Mr. Morgan's responsibility to drive down to the West Market Street office to unlock the gate so that the driver can pick up the bus.

On the night of 16 March 2011, a driver for Morgan & Sons, Danny Pulliam, called the Morgans and requested that the gate at the West Market Street office be opened for him the next morning because he did not have a key to the gate. Mr. Pulliam was supposed to pick up people at various hotels and deliver them to the offices of a company that had a contract with Morgan & Sons.

The next morning, on 17 March 2011, at around 6:30 a.m., Mr. Morgan drove a 2000 Cadillac owned by C&W Motors from his house to the West Market Street office to open the gate for the driver. As he made a left turn to enter the West Market Street office drive, he struck plaintiff who was traveling on his motorcycle in the opposite direction on West Market Street. Plaintiff suffered severe injuries, and Mr. Morgan was cited for failure to yield the right of way.

Plaintiff filed suit against Mr. Morgan, Morgan & Sons, and C&W Bus Company, Inc. in Guilford County Superior Court.

Plaintiff alleged, among other things, that Mr. Morgan's negligent driving injured plaintiff, that Morgan & Sons was vicariously liable for plaintiff's injuries, and that the corporate veil should be pierced between Morgan & Sons and C&W Motors. Mr. Morgan's attorney filed an answer denying Mr. Morgan's fault in the accident. In Mr. Morgan's deposition, however, Mr. Morgan admitted liability for causing Mr. Logan's injuries.

An insurance carrier for Morgan & Sons, National Interstate Specialty Insurance Co., filed an action in federal court seeking a declaratory judgment that its policy did not cover plaintiff's claims for his injuries. On 28 June 2012, Judge Lindsay R. Davis, Jr. entered an order granting the parties' request that this action be placed on inactive status pending resolution of the federal action. Subsequently, in the federal action, the parties filed cross-motions for summary judgment, which were denied in an order entered 13 January 2014. That order stayed any further determination of liability issues in the federal action until the conclusion of the state court proceedings.

On 16 January 2014, plaintiff moved for partial summary judgment in this action, contending that "there is no issue of fact on the issues of negligence, respondeat superior, and

piercing the corporate veil." Plaintiff contended that the only disputed issue was damages. Morgan & Sons cross-moved for summary judgment on the basis that "the Defendant, Charles Albert Morgan, was not acting in the course and scope of his employment with Morgan & Sons Week-end Tours, Inc." The trial court granted Morgan & Sons' motion for summary judgment and denied plaintiff's motion for summary judgment in an amended order on 24 March 2014 that certified the order for immediate appeal pursuant to Rule 54(b) of the Rules of Appellate Procedure. Plaintiff appealed to this Court.

Discussion

Generally, in reviewing a trial court's grant of summary judgment,

> [o]ur standard of review . . . is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. When reviewing a grant of summary judgment evidence presented by the parties must be viewed in the light most favorable to the non-movant.

Estate of Joyner v. Joyner, ___ N.C. App. ___, ___, 753 S.E.2d 192, 193 (2014) (internal citations and quotation marks omitted).

The sole issue on appeal is whether a genuine issue of material fact exists on the question whether Morgan & Sons is

liable for any negligence by Mr. Morgan. It is well established that

> [g]enerally, liability of a principal for the torts of his agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is ratified by the principal; or (3) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business. In the first two of these three situations, liability is based upon traditional agency principles; in the third of these three situations, liability is based upon the doctrine of *respondeat superior.*

Creel v. N.C. Dep't of Health & Human Servs., 152 N.C. App. 200, 202-03, 566 S.E.2d 832, 833 (2002) (internal citation omitted).

Plaintiff first contends that a jury could find Morgan & Sons vicariously liable under a theory of respondeat superior because there was evidence that Mr. Morgan was acting "within the scope of his employment." "'To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment.'" *Matthews v. Food Lion, LLC*, 205 N.C. App. 279, 282, 695 S.E.2d 828, 831 (2010) (quoting *Troxler v. Charter Mandala Ctr.*, 89 N.C. App. 268, 271, 365 S.E.2d 665, 668 (1988)). "The primary inquiry in determining vicarious liability under the doctrine of *respondeat superior* is whether the principal retains the right

to control and direct the details of the work." *MGM Transp. Corp. v. Cain*, 128 N.C. App. 428, 431, 496 S.E.2d 822, 824 (1998).

Generally, "an employee is not engaged 'in the business of' the employer while driving to and from the place of employment." *Id.* (quoting *McLean Trucking Co. v. Occidental Fire & Cas. Co. of N.C.*, 72 N.C. App. 285, 291, 324 S.E.2d 633, 637 (1985)). However, "where the employee is acting at the direction of, or in the performance of some duty owed to, the employer when making the trip, the employee may be said to be acting in the scope of employment." *Id.*

Morgan & Sons argues that this case is indistinguishable from *Wilkie*, in which our Supreme Court applied the above principles and held that the employer store in that case could not be liable under a theory of respondeat superior for an injury to a pedestrian caused by its employee, the store's superintendent. 196 N.C. at 797, 147 S.E. at 297-98. In *Wilkie*, the superintendent was responsible for driving to the store on holidays to turn on the store's lights "'for [his employer's] benefit and protection[.]'" *Id.* at 795, 147 S.E. at 296. While he was driving to the store on Christmas evening, he ran over a pedestrian. *Id.*

In addressing whether the store superintendent was in the furtherance of his employer's business at the time of the accident, the Court first noted that "[t]here [was] no evidence that [the store] retained the right to say how [its employee] should travel in going to and from the store[,]" that the employee had bought his car for his own use, and the store "had no interest in it and no control over it except" in times of emergency and under the store manager's instructions. *Id.* at 796, 147 S.E. at 297. The Court then concluded:

> Upon the admitted facts [the employee] was not engaged in the furtherance of his master's business at the time of the injury. His sole duty was to turn on the lights; this duty could not be performed by him before he arrived at the store. Upon his arrival there he was to enter upon the discharge of the specific duty he was to perform on holidays, and his mode of traveling was his personal affair. To permit a recovery against [the employer] under these circumstances would be to enlarge the rule of *respondeat* superior to such an extent as to make the master liable for every negligent act his servant might commit while going to or from his place of work, though transported in a vehicle of his own selection over which the master had no control and in which he had no interest.

Id. The Court, therefore, concluded that respondeat superior did not apply, and the store was not liable for the plaintiff's injuries.

Although *Wilkie* dates back to 1929, it has not been overruled, explicitly or implicitly, by the Supreme Court and, therefore, is controlling in this Court. We agree with Morgan & Sons that *Wilkie* is materially indistinguishable from the evidence in this case.

Here, the evidence is undisputed that one of Mr. Morgan's responsibilities for Morgan & Sons was to drive in the morning to open the company's gate to allow drivers to access their buses when the drivers did not have a key. His sole responsibility on those mornings was to unlock the gate, and, like the superintendent in *Wilkie*, he could not perform that duty until he got to his employer's premises. After he opened the gate, Mr. Morgan was then free to do whatever he wanted to do, including returning home or going out for breakfast. The record contains no evidence suggesting that Morgan & Sons controlled how Mr. Morgan travelled to the West Market Street office or that Morgan & Sons had any interest or control over the car Mr. Morgan chose to drive to the office. Indeed, the undisputed evidence was that C&W Motors owned the car Mr. Morgan was driving. These facts cannot be distinguished from those in *Wilkie*.

Plaintiff does not address *Wilkie* in his arguments. However, although plaintiff points to the evidence that Mr.

Morgan did not open the gate every day or even frequently, arguing that this was a special errand for which Morgan & Sons should be liable, the evidence that Mr. Morgan was responsible for making a special trip to the office to open the gate whenever a driver needed him to do so is no different than the evidence in *Wilkie* that the store superintendent made a special trip to the store on holidays solely to turn on the lights.

Plaintiff, however, also points to Mr. Morgan's statement that "I was working when I left home" the morning of the accident, as well as Mrs. Morgan's statement that she "consider[ed] [Mr. Morgan] to be working for Morgan & Sons" when he left the house. These conclusory statements, unsupported by specific facts, are insufficient to defeat summary judgment. *See, e.g., In re Foreclosure of Gilbert*, 211 N.C. App. 483, 495, 711 S.E.2d 165, 173 (2011) (holding that "we disregard [the witness'] conclusion as to the identity of the 'owner and holder' of the instruments"); *Speedway Motorsports Int'l Ltd. v. Bronwen Energy Trading, Ltd.*, 209 N.C. App. 474, 490 n.2, 707 S.E.2d 385, 395 n.2 (2011) ("While SMIL argues vigorously that this Court must accept SMIL's affidavits as true, including all statements in those affidavits, our standard of review does not require that we accept a witness' characterization of what 'the facts' mean."); *Blackwell v. Hatley*, 202 N.C. App. 208, 221, 688

S.E.2d 742, 751 (2010) ("However, the question of legal liability is a question of law for the court, and [the witness'] personal opinions do not create any issue of fact.").

Plaintiff also suggests that this testimony by Mr. and Mrs. Morgan amounted to either a judicial or evidentiary admission by Morgan & Sons that Mr. Morgan's driving was within the scope of his employment. However, this argument was raised for the first time on appeal in plaintiff's reply brief. It, therefore, is improperly before us. *See* N.C.R. App. P. 28(b)(6); *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 708, 682 S.E.2d 726, 740 (2009) ("By raising his condition precedent argument for the first time in his reply brief, Hardin has frustrated the adversarial process by depriving defendants of the opportunity to respond to his argument.").

Plaintiff also contends that because Mr. Morgan drove to the West Market Street office after being requested to do so by Mrs. Morgan, the evidence suggests that Mr. Morgan was "on a discreet [sic], special and necessary mission on behalf of Morgan & Sons" and that his morning trip was "*solely* in response to a specific business need of, and instruction from, his employer," similar to that of the drivers in *MGM Transport* and *Evington v. Forbes*, 742 F.2d 834 (4th Cir. 1984), which was cited favorably in *MGM Transport*. Acknowledging that the

drivers in *MGM Transport* and *Evington* were "on call" at the time they returned to their employer's premises, plaintiff contends that Mr. Morgan was similarly "on call."

In *MGM Transport*, the plaintiff was injured by the driver of a tractor trailer over which the defendant MGM, a shipping company, had "'exclusive possession, control and use'" at the time the driver was driving the tractor from his home to the MGM terminal in High Point. 128 N.C. App. at 429, 496 S.E.2d at 823. Prior to leaving his house, the driver was "on-call," meaning "he was required to be in readiness to go to the terminal to pick up a load." *Id.* at 431, 496 S.E.2d at 825. Further, when responding to a call from MGM, before the driver left his home driving the tractor, "he was required to perform pre-trip inspections and maintenance on the tractor." *Id.* At the time of the accident, the driver was "acting upon instructions from MGM in driving the tractor to the terminal" to pick up a shipment. *Id.* This Court held that "[t]hese facts . . . establish as a matter of law that [the driver] was acting in furtherance of the business of MGM" in driving the tractor to the terminal, and, therefore, MGM was vicariously liable for the injuries caused by the driver. *Id.*

In *Evington*, a jury found a hospital vicariously liable for the negligent driving of its employee who, while on "call-back"

status, was summoned to the hospital and was in an accident while driving on his way there. 742 F.2d at 835. The employee in *Evington* was "paid time and a half" while on "call-back" status, and during this time he was "required . . . to be available to report to the Hospital[.]" *Id.* at 835-36. Because the employee "was . . . responding to such a call [from the hospital] at the time of his collision with Evington[,]" the Fourth Circuit found the jury's verdict was supported by the evidence. *Id.* at 836.

Here, in contrast to *MGM Transport* and *Evington*, there is no evidence that Mr. Morgan was "on call" and required to stop whatever he was doing and report to work or that he was paid for the time he was driving to the office. Although Mr. Morgan was required to be at the office to open the gate on the morning of the accident, Mr. Morgan was not, before or at the time of the accident, performing any actual tasks or duties for Morgan & Sons that were relevant to the trip to the office. Indeed, Mr. Morgan's testimony shows that prior to the accident, he did nothing more than get up and drive a vehicle owned by another company to the West Market Street office where he was supposed to open the gate -- a regular responsibility -- because Mr. Pulliam had called the night before to request that the gate be unlocked.

This evidence is comparable to that of *Wilkie* and not that of *MGM Transport* and *Evington*. We, therefore, conclude that Mr. Morgan was not acting within the scope of his employment at the time of the accident, and Morgan & Sons could not be held liable for Mr. Morgan's negligence under a theory of respondeat superior.

Alternatively, plaintiff argues that there was evidence that Morgan & Sons ratified Mr. Morgan's negligent conduct. Ratification is "'the affirmance *by a person of a prior act which did not bind him* but which was done or professedly done on his account, whereby the act, as to some or all persons, is *given effect as if originally authorized* by him.'" *Espinosa v. Martin*, 135 N.C. App. 305, 308, 520 S.E.2d 108, 111 (1999) (emphasis added) (quoting *Am. Travel Corp. v. Cent. Carolina Bank*, 57 N.C. App. 437, 442, 291 S.E.2d 892, 895 (1982)).

The doctrine of ratification is not implicated *unless* there is evidence that an employee's action was not expressly authorized or was done outside the scope of his employment. *See Wachovia Bank of N.C., N.A. v. Bob Dunn Jaguar, Inc.*, 117 N.C. App. 165, 173, 450 S.E.2d 527, 532 (1994) ("'Ratification requires intent to ratify . . . an unauthorized act[.]'" (quoting *Am. Travel. Corp.*, 57 N.C. App. at 442, 291 S.E.2d at 895)). *See also Hogan v. Forsyth Country Club Co.*, 79 N.C. App.

483, 492, 340 S.E.2d 116, 122 (1986) (reaching question of ratification only after finding *no* evidence that act of sexual harassment was "within the scope of [employee's] employment or in the furtherance of any purpose of the [employer]" but was instead "in pursuit of some corrupt or lascivious purpose of his own").

The only evidence that plaintiff points to in the record in support of his ratification argument is Mrs. Morgan's testimony that she considered Mr. Morgan to be working when he left the house to drive to the West Market Street office. This conclusory testimony, while not sufficient to establish liability based on respondeat superior, is inconsistent with the doctrine of ratification because it asserts only that Mr. Morgan was acting within the scope of his employment for Morgan & Sons when he injured plaintiff.

Because plaintiff failed to present sufficient evidence that Mr. Morgan was acting in the scope of his employment when he collided with plaintiff or that Morgan & Sons ratified his negligent conduct, the trial court properly granted Morgan & Sons' motion for summary judgment. We, therefore, also hold that the trial court did not err in denying plaintiff's motion for summary judgment.

Affirmed.

Judges STROUD and BELL concur.

Report per Rule 30(e).