IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 5/23/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

MICKEY RAY ARBOGAST, Plaintiff/Appellant, v. COMIDA MANAGEMENT, LLC, dba Mi Amigo's Mexican Grill, an Arizona limited liability company, Defendant/Appellee.	)	1 CA-CV 12-0579 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-095481

The Honorable Karen A. Potts, Judge

AFFIRMED

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And David R. Schwartz
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By William C. Knoche
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K E S S L E R, Judge

¶1 Mickey Ray Arbogast appeals the order granting summary judgment to Comida Management, LLC. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 On November 18, 2010, while arriving for his work shift at Mi Amigo's restaurant, Pablo Zamora Godinez was in a car collision with Arbogast. Comida employed Godinez at its restaurant, and Godinez was driving a vehicle owned by Alejandro Macias Rodriguez, an assistant manager at the restaurant. Arbogast filed this action for negligence against Godinez, Rodriguez, and Comida. He alleged Comida was vicariously liable for the negligence of its employees because they were acting within the course and scope of their employment at the time of the collision.

¶3 Comida moved for summary judgment on the grounds that it could not be held vicariously liable for its employees' alleged negligence because Godinez was commuting to work at the time of the accident, Rodriguez was off duty, and the company did not direct or permit Rodriguez to allow Godinez to use his vehicle. In opposition, Arbogast relied on Rodriguez's deposition testimony, in which he stated that his duties included ensuring that all employees were at work for their shifts and that the restaurant had a policy of helping employees who did not have transportation to work. Rodriguez also testified that, in the past, he had sent employees who were on the clock at the

restaurant to pick up other employees and bring them to work. Comida's president denied that it had any such policy or knew of that activity, and cited Rodriguez's testimony that he made the decision to lend his vehicle to Godinez "as a friend." The court granted Comida's motion, ruling that any negligence by Godinez and Rodriguez could not, as a matter of law, be attributed to Comida because it did not occur within the scope of their employment.[1]

¶4 Arbogast timely appealed. Arbogast argues that summary judgment was improvidently granted because the record contains genuine issues of material fact regarding whether Godinez and Rodriguez were acting within the course and scope of their employment at the time of the collision.

¶5 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2012).

DISCUSSION

¶6 A court may grant summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Ariz. R. Civ. P. 56(c). We view the evidence in the light most favorable to Arbogast, "against whom judgment was entered, and determine *de novo* whether there are any genuine issues of material fact and

[1] The superior court found no just reason for delay and directed that its order be entered as a final judgment. *See* Ariz. R. Civ. P. 54(b).

whether the trial court erred in its application of the law." *Unique Equip. Co. v. TRW Vehicle Safety Sys., Inc.*, 197 Ariz. 50, 52, ¶ 5, 3 P.3d 970, 972 (App. 1999).

¶7 An employer may be vicariously liable when an employee acts "within the course and scope of employment." *Engler v. Gulf Interstate Eng'g, Inc.*, 227 Ariz. 486, 491, ¶ 17, 258 P.3d 304, 309 (App. 2011) (citing *Restatement (Third) of Agency* § 7.07(1) (2006)). An employee's conduct is within the course and scope of employment when the employee acts "subject to the employer's control or right of control" and "in furtherance of the employer's business." *Id.; see also Baker ex rel. Hall Brake Supply, Inc. v. Stewart Title & Trust of Phoenix, Inc.*, 197 Ariz. 535, 540, ¶ 17, 5 P.3d 249, 254 (App. 2000) (stating that an employee's conduct falls within the scope of employment "if it is the kind the employee is employed to perform, it occurs within the authorized time and space limits, and [it] furthers the employer's business"). Whether an employee's action was within the course and scope of employment is generally a question of fact unless the conduct was clearly outside the scope of employment. *Engler*, 227 Ariz. at 491-92, ¶ 17, 258 P.3d at 309-10.

A. Godinez

¶8 Arbogast contends Godinez was acting within the course and scope of his employment while driving to work on November 18, 2010, when he caused the collision.

¶9 Generally, an employer is not liable for the conduct of an employee going to and coming from work. *Smithey v. Hansberger*, 189 Ariz. 103, 107, 938 P.2d 498, 502 (App. 1996). However, Arizona law recognizes an exception "when the employer provides transportation to the employee and the travel time appears to benefit the employer." *Id.* For example, in *Smithey* we held that a driver-employee was acting within the course and scope of his employment while driving co-employees to work as part of an employer-sponsored van pool. *Id*. at 108, 938 P.2d at 503. The employer furnished the van, which it maintained, repaired and fueled, administered the van pool program by specifying the driver and participants in each van pool, and issued written rules for participants in the program. *Id*. The court held that the "employer's conveyance exception" to the "going and coming" rule applied under such circumstances. *Id*. at 107-08, 938 P.2d at 502-03.

¶10 Arbogast argues a genuine issue of material fact exists regarding whether the employer's conveyance exception applies in this case because Comida had a policy of providing its employees transportation to work. He cites Rodriguez's testimony that the

restaurant had a policy of helping employees who did not have transportation and that, in the past, he had sent on-duty employees from the restaurant to pick up other employees and bring them to work. Even assuming Comida had such a policy,[2] it was not implicated in this case because Rodriguez did not dispatch an on-the-clock employee to pick up Godinez and bring him to work. Rather, Rodriguez, who was off-duty and at home, loaned his personal vehicle to Godinez. Accordingly, Godinez was not utilizing an employer-provided conveyance to travel to work at the time of the collision and his conduct does not fall within that exception to the "going and coming" rule.

¶11 The superior court properly granted summary judgment for Comida on Arbogast's claim for vicarious liability arising of out Godinez's actions.

B. Rodriguez

¶12 Arbogast also argues that a genuine issue of material fact exists regarding whether Rodriguez was acting within the course and scope of his employment when he allegedly negligently entrusted his vehicle to Godinez. In particular, Arbogast contends the evidence would allow a reasonable jury to determine

[2] Comida disputed that it had a program or policy of providing transportation to work for its employees and denied any knowledge of such activity. For purposes of our review, we accept Arbogast's alleged facts as true and draw all reasonable inferences from the evidence in his favor. *See Sanchez v. City of Tucson*, 191 Ariz. 128, 130, ¶ 7, 953 P.2d 168, 170 (1998).

that Rodriguez permitted Godinez to borrow his vehicle in order to fulfill his responsibility to ensure that Comida's employees were present for their shifts and, thus, that his actions were in furtherance of Comida's business.

¶13 It is undisputed that Rodriguez was off-duty when he allowed Godinez to borrow his personal vehicle. Rodriguez testified that on the day of the accident he was visiting with Godinez at home when Godinez realized his shift at the restaurant would begin shortly and asked if he could borrow Rodriguez's vehicle to drive to work. Rodriguez testified that he had previously allowed Godinez to borrow his vehicle to drive to work or conduct other errands, that he made the decision to allow Godinez to borrow his vehicle on the day of the accident "as a friend," and that he would have allowed Godinez to use the vehicle to run personal errands if Godinez had asked to use it for that purpose.

¶14 Nevertheless, Arbogast maintains Rodriguez intended to benefit Comida by lending his vehicle to Godinez because one of Rodriguez's job responsibilities was to make sure that employees were at work on time. However, that evidence does not create a genuine issue of material fact regarding whether Rodriguez was acting within the course and scope of his employment because there is no evidence that Rodriguez was subject to Comida's control outside of his working hours or that he remained

responsible for restaurant operations while off-duty. *See Engler*, 227 Ariz. at 491, ¶ 17, 258 P.3d at 309; *Baker*, 197 Ariz. at 540, ¶ 17, 5 P.3d at 254.

¶15 Based on the evidence, no reasonable jury could find that Rodriguez was acting in the course and scope of his employment when he allowed Godinez to use his vehicle on November 18, 2010. Accordingly, the superior court properly granted summary judgment for Comida on Arbogast's claim for vicarious liability arising out of Rodriguez's actions.

¶16 Arbogast requests an award of costs on appeal. We deny his request because he is not the prevailing party. We will, however, award Comida its costs upon its compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶17 For the foregoing reasons, we affirm.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
MAURICE PORTLEY, Presiding Judge

/S/
SAMUEL A. THUMMA, Judge