IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MICHAEL COREY CRAVENS, SURVIVING SPOUSE OF
SAMANTHA J. CRAVENS, DECEASED,
Plaintiff/Appellant,

v.

MARTIN A. MONTANO, JR., A SINGLE MAN; AND CASAS CUSTOM FLOOR CARE, LLC, AN ARIZONA LIMITED LIABILITY COMPANY,
Defendants/Appellees.

No. 2 CA-CV 2020-0115
Filed May 25, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20192093
The Honorable Brenden J. Griffin, Judge

VACATED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Espinosa and Judge Eckerstrom concurred.

S T A R I N G, Vice Chief Judge:

¶1 Michael Corey Cravens appeals from the trial court's grant of summary judgment in favor of Casas Custom Floor Care, LLC in a wrongful-death action predicated on a theory of vicarious liability. For the following reasons, we vacate the judgment and remand the case to the trial court for further proceedings.

Factual and Procedural Background

¶2 In April 2018, Martin Montano, a Casas employee, left a job site in order to fill out and correct his timesheet at Casas's office. En route, he ran a red light and collided with Samantha Cravens's car, causing her death.

¶3 Cravens commenced this action against Montano and Casas, alleging the wrongful death of his wife, negligence, negligence per se, and vicarious liability on the part of Casas. Casas later filed a motion for summary judgment, alleging that, at the time of the accident, "Montano was not acting within the course and scope of employment." Cravens opposed the motion and cross-moved for summary judgment that Casas was vicariously liable as a matter of law for Montano's role in the accident. The trial court granted Casas's motion, reasoning that, based on "undisputed" facts, Montano had not been under Casas's control at the time of the accident.

¶4 Cravens subsequently filed a motion for reconsideration, which the trial court denied. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

¶5 We review the trial court's grant of summary judgment de novo. *See BMO Harris Bank, N.A. v. Wildwood Creek Ranch, LLC*, 236 Ariz. 363, ¶ 7 (2015). And, we construe the facts and all reasonable inferences in the light most favorable to Cravens. *See Engler v. Gulf Interstate Eng'g, Inc.*, 230 Ariz. 55, ¶ 8 (2012).

¶6 Summary judgment is proper where "the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). When a party has made a prima facie showing in support of summary judgment, the non-moving party has a burden to bring forward evidence raising a triable issue of fact. *McCleary v. Tripodi*, 243 Ariz. 197, ¶ 21 (App. 2017). Such evidence may not merely recite the allegations in the pleadings, but, instead, must show "specific facts" demonstrating "a genuine issue for trial." *Id.* (quoting *Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, ¶ 15 (App. 2000)). Even if a cross-motion for summary judgment is filed, summary judgment is improper if there are genuine issues as to material facts. *Grain Dealers Mut. Ins. Co. v. James*, 118 Ariz. 116, 118 (1978).

¶7 When determining whether to grant summary judgment, the trial court must refrain from weighing witness credibility and the quality of the evidence, and must not "choose among competing or conflicting inferences." *Orme Sch. v. Reeves*, 166 Ariz. 301, 311 (1990). Our duty on appeal is to determine if there were any material factual disputes, or disputes as to inferences drawn from material facts, and if not, whether the court applied the law correctly. *See Cliff Findlay Auto., LLC v. Olson*, 228 Ariz. 115, ¶ 8 (App. 2011); *cf. Santiago v. Phx. Newspapers, Inc.*, 164 Ariz. 505, 508 (1990). And, we are mindful of our supreme court's admonition that "summary judgment should not be used as a substitute for jury trials simply because the trial judge may believe the moving party *will* probably win the jury's verdict, nor even when the trial judge believes the moving party *should* win the jury's verdict." *Orme Sch.*, 166 Ariz. at 310.

¶8 An employer is "vicariously liable for the negligent work-related actions of its employees" who are acting within the scope of their employment at the time of an accident. *Engler*, 230 Ariz. 55, ¶ 9 (quoting *Tarron v. Bowen Mach. & Fabricating, Inc.*, 225 Ariz. 147, ¶ 9 (2010)). Unless "the undisputed facts indicate that the conduct was clearly outside the scope of employment," "[w]hether an employee's tort is within the scope

of employment is . . . a question of fact." *Smith v. Am. Express Travel Related Servs. Co.*, 179 Ariz. 131, 136 (App. 1994).

¶9 "An 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." Restatement (Third) of Agency § 7.07(2) (2006); *see Engler*, 230 Ariz. 55, ¶ 13 (Restatement § 7.07(2) "sets forth the appropriate test for evaluating whether an employee is acting within the scope of employment."). Factors relevant to whether an employee was subject to the employer's control include:

> (a) whether the act is one commonly done by such servants; (b) the time, place, and purpose of the act; (c) the previous relations between the master and servant; (d) the extent to which the business of the master is apportioned between different servants; (e) whether the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant; (f) whether the master has reason to expect that such an act will be done; (g) the similarity in quality of the act done to the act authorized; (h) whether the instrumentality by which the harm is done has been furnished by the master to the servant; (i) the extent or departure from the normal method of accomplishing an authorized result; and (j) whether the act is seriously criminal.

Higgins v. Assmann Elecs., Inc., 217 Ariz. 289, ¶ 29 (App. 2007) (citing Restatement (Second) of Agency § 229(2) (1958)); *see Engler*, 230 Ariz. 55, ¶ 11.

¶10 On appeal, Cravens argues the trial court erred in granting Casas's motion for summary judgment because "the record . . . at a minimum, demonstrates a question of fact" on the issue of whether Montano acted in the course and scope of his employment. Specifically, he claims "[t]he facts . . . and reasonable inferences therefrom [would allow] a jury to conclude that Montano was 'performing work assigned by [Casas]' at the time of the collision" or was "engaging in a course of conduct subject to [Casas]'s control." Restatement § 7.07(2). Further, Cravens asserts we should conclude "as a matter of law" that Montano was acting in the course and scope of his employment.

¶11 Casas contends "Montano was not acting within the course and scope of employment when the accident occurred" primarily because Casas's "requisite right of control [was] absent" at the time of the accident. Specifically, it asserts "the undisputed facts, with all *reasonable* inferences drawn in favor of . . . Cravens," warranted summary judgment.[1]

¶12 We conclude the undisputed facts did not demonstrate Montano's conduct at the time of the accident was "clearly outside the scope of employment." *Smith*, 179 Ariz. at 136. At most, these facts established background information, immaterial company procedures, non-dispositive information about the day of the accident, and details on misrepresentations in timesheets in general. Based on the record before us, however, whether Montano was acting in the course and scope of his employment remains a material factual dispute. *See Cliff Findlay Auto.*, 228 Ariz. 115, ¶ 8.

¶13 Specifically, the parties contest, among other things, whether "[e]very day" Casas employees drove "back to the main office at the end of the day" and whether Montano had intended to drive "directly" back to the office, had been required to correct the timesheet, and was being "paid . . . for working" at the time of the accident. In Cravens's statement of facts below, however, he pointed to deposition testimony from a Casas employee confirming that "after [they are] done working at a job site, [they] will return from that job site back to the home yard at the end of the day." He also presented Montano's deposition testimony that he did not "have anything to do right after . . . unloading the freight, so [he] decided to take a drive to" Casas's office. As to the purported requirement that Casas employees correct their timesheets, Cravens pointed to the testimony of a Casas supervisor affirming that employees are "expected to complete their timesheets on a daily basis." Cravens also directed the trial court to Montano's confirmation that he had been paid for the time during which the accident occurred.

¶14 Cravens, therefore, met his burden of opposing summary judgment by demonstrating the existence of a genuine issue of material fact.

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[1]In the "Statement of Facts" section of its answering brief, Casas claims the facts on which Cravens relies "are either completely unsupported, taken out of context, or so roundly contradicted by the full record that no reasonable finder of fact could accept them." Notably, however, in announcing its decision from the bench and explaining its reasoning, the trial court described the issue as a "close case."

See McCleary, 243 Ariz. 197, ¶ 21. The contested facts noted above relate to whether Montano's undisputed conduct at the time of the accident—returning to the Casas office to update or prepare his timesheet—was a common practice of Casas employees, occurred at a time, in a place, and with a purpose consistent with Casas's control, and was to be reasonably expected by Casas, or whether it was a "departure from the normal method of accomplishing an authorized result." *Higgins*, 217 Ariz. 289, ¶ 29; *see Engler*, 230 Ariz. 55, ¶ 11. Therefore, they are determinative of whether Montano was subject to Casas's control at the time of the accident, and thus, whether he was within the course and scope of his employment, potentially exposing Casas to liability. *See Engler*, 230 Ariz. 55, ¶¶ 9, 13; Restatement § 7.07(2) (employee acts in course and scope of employment either when performing assigned work *or* "engaging in a course of conduct subject to the employer's control"). The trial court erred in granting Casas's motion for summary judgment.[2]

Request for Sanctions

¶15 Cravens asks us to impose sanctions in the form of attorney fees against Casas pursuant to A.R.S. § 12-349 and Rule 25, Ariz. R. Civ. App. P. Specifically, he alleges Casas's answering brief "repeatedly states facts that are simply not so," "falsely accuses [him] of stating facts that are 'completely unsupported' and 'plain false,'" and makes "misrepresentations of . . . law." Thus, Cravens contends he was forced to "spend an inordinate amount of effort and time unpacking" Casas's arguments, which "unreasonably expanded these proceedings." *See* § 12-349(A)(3). We disagree; this case involves contested facts, neither side is

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[2] We similarly conclude Cravens was not entitled to summary judgment that Montano *was* acting within the course and scope of his employment. *See McCleary*, 243 Ariz. 197, ¶ 21 (summary judgment only appropriate if there are no genuine disputes as to material facts). In line with the contested facts and factors listed above, Casas pointed to Montano's conflicting testimony that he was "not working" and "off the clock" at the time of the accident. Further, Casas highlighted Montano's testimony stating he "could have easily" made a phone call in order to correct his timesheet. Finally, Casas cited the testimony of one of its supervisors stating that once the work was completed at the job site, the only discussion that took place was related to "the fact that the day was over . . . [and they] couldn't work anymore."

entitled to summary judgment, and we see no evidence the proceedings have been unreasonably expanded. The request for sanctions is denied.

Disposition

¶16 For the foregoing reasons, we vacate the judgment in favor of Casas and remand the case to the trial court for further proceedings consistent with this decision.