IN THE COURT OF APPEALS OF IOWA

No. 2-748 / 12-0246
Filed November 15, 2012

LAURA JEAN,
Plaintiff-Appellant,

vs.

HY-VEE, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Linn County, Sean W. McPartland (first summary judgment ruling), William L. Thomas (ruling on motion to amend petition), and Robert E. Sosalla (second summary judgment ruling), Judges.

Laura Jean appeals from the district court orders granting summary judgment in favor of Hy-Vee, Inc. and Hy-Vee Food Stores, Inc. on her negligence claims and denying her motion for leave to amend her petition. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.**

H. Daniel Holm, Jr., and Eashaan Vajpeyi of Ball, Kirk & Holm, P.C., Waterloo, and Larry J. Thorson, Cedar Rapids, for appellant.

Terry J. Abernathy and Stephanie L. Hinz of Pickens, Barnes & Abernathy, Cedar Rapids, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

TABOR, J.

A customer struck by a bicycle ridden by an employee of the grocery store she was leaving appeals from two district court orders granting summary judgment in favor of Hy-Vee, Inc. That customer, Laura Jean, contends her claims of respondeat superior and premises liability present genuine issues of material fact. She also challenges the denial of her motion for leave to amend her petition to include a claim of negligent supervision.

First, because undisputed evidence shows the cyclist was not acting within the scope of his employment at the time Jean was injured, we affirm the district court's grant of summary judgment on the respondeat superior theory. Second, because a reasonable fact finder could conclude HyVee should have discovered a dangerous condition that posed an unreasonable risk to customers leaving its store and failed to protect the customers from that risk, summary judgment was not appropriate on Jean's claim concerning HyVee's control of its premises. Third, because the district court blurred the distinction between Jean's claims of respondeat superior and negligent supervision, we find an abuse of discretion in its denial of her motion to amend the petition. Accordingly, we reverse the grant of summary judgment on the premises liability claim and reverse the denial of leave to amend. We remand the case so that Jean may pursue her premises liability and negligent supervision claims.

I. Background Facts and Proceedings.

Around 8:30 a.m. on September 13, 2009, Laura Jean was carrying her groceries out of a Hy-Vee store in Cedar Rapids when she stepped onto the

sidewalk adjacent to the entrance and was struck by a bicycle.[1] Riding the bicycle was sixteen-year-old Bryce Lewis, an employee of the Hy-Vee. Lewis had arrived at the store half an hour before his 9 a.m. starting time, but realized he was missing his belt, a required component of his work attire. Lewis asked and received permission from his supervisor to return home to grab his belt. He retrieved his bicycle from a rack anchored near the north entrance to the store and rode it on the sidewalk bordering the store. Lewis was in a hurry and struck Jean at a relatively high rate of speed, knocking her to the ground. The olive oil bottle she had just purchased shattered and cut her forearm and wrist. Jean's right ankle was broken in the collision. At the hospital, she required stitches in her arm and a surgeon placed twelve pins and two plates in her ankle.

Jean sued Hy-Vee, alleging the company was liable for her injuries caused by the collision with Lewis. The petition alleged Lewis was operating his bicycle in the course and scope of his employment with Hy-Vee, and therefore, Hy-Vee is liable for his negligence. It also alleged Hy-Vee was negligent in the care, custody, and control of its premises. Jean claimed damages for medical expenses, loss of earnings, loss of full mind and body, and pain and suffering.

Hy-Vee filed a motion for summary judgment on the respondeat superior claim, but failed to raise an argument regarding the premises liability claim until its reply brief. On November 22, 2010, Jean filed a resistance. The district court entered a ruling on January 12, 2011, dismissing Jean's negligence claim under

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[1] We derive these facts from the summary judgment record, which included depositions from Lewis, as well as several other Hy-Vee employees. Jean also offered a report from Lampe Consulting, an engineering firm, addressing perceived hazards on the store premises.

the theory of respondeat superior, but finding the claim regarding premises liability was not properly before it. The district court denied Jean's motion to reconsider.

On February 11, 2011, Jean filed a motion for leave to amend her petition to add a claim against Hy-Vee for negligent supervision, training, and regulation of its employees. The district court denied the motion on the grounds it had already determined Lewis's tortious conduct was not a result of any acts performed within the scope of his employment.

Hy-Vee brought a second motion for summary judgment on June 8, 2011, seeking dismissal of the premises liability claim. On September 30, 2011, Jean filed a supplemental resistance, attaching an expert opinion regarding the danger in the store's design. On January 24, 2012, the court granted the motion and dismissed Jean's remaining claim. Jean now appeals, challenging all three district court rulings.

II. Scope and Standard of Review.

Our review is for the correction of errors at law. Iowa R. App. P. 6.907. We examine a summary judgment record to determine whether the moving party demonstrated the absence of any genuine issue of material fact that entitles it to judgment as a matter of law. *C & J Vantage Leasing Co. v. Outlook Farm Golf Club, L.L.C.*, 784 N.W.2d 753, 756 (Iowa 2010). An issue is material if it might affect the outcome of the action, and it is genuine if a reasonable jury could return a verdict for the non-moving party. *Id.* In reviewing a summary judgment action, we examine the record in the light most favorable to the non-moving party

to determine if the party seeking summary judgment has met its burden. *Id.* We afford the opposing party every legitimate inference the record will allow. *Frontier Leasing Corp. v. Links Eng'g, L.L.C.*, 781 N.W.2d 772, 775 (Iowa 2010).

We review the court's denial of a motion for leave to amend for an abuse of discretion. *See Holliday v. Rain & Hail L.L.C.*, 690 N.W.2d 59, 63 (Iowa 2004). An abuse of discretion occurs where the court bases its decision on clearly untenable grounds or to an extent clearly unreasonable. *Rife v. D.T. Corner, Inc.*, 641 N.W.2d 761, 766 (Iowa 2002).

III. Summary Judgment.

Jean contends the district court erred in granting summary judgment on her claims for negligence based on respondeat superior and premises liability theories. She argues a genuine issue of material fact exists with regard to both claims.

A. Whether Lewis was acting in the scope of his employment.

Under the doctrine of respondeat superior, an employer is vicariously liable for the negligent acts of its employees. *Dickens v. Associated Anesthesiologists, P.C.*, 709 N.W.2d 122, 125 (Iowa 2006). A claim brought under the doctrine of respondeat superior requires proof of two elements: (1) the existence of an employer/employee relationship and (2) proof the injury occurred within the scope of that relationship. *Walderbach v. Archdiocese of Dubuque, Inc.*, 730 N.W.2d 198, 201 (Iowa 2007).

The district court found Jean's claim for negligence under the respondeat superior doctrine must fail because, at the time of the collision, Lewis was not on

duty for Hy-Vee and was not acting within the scope of his employment. Jean argues the court's finding overlooks the fact that Lewis was riding his bike home to retrieve his belt at the direction of his supervisor.

We have defined the phrase "scope of employment" as those acts so closely connected to the tasks that an employee was hired to perform and so fairly and reasonably incidental to them, that the acts may be regarded as methods of carrying out the objectives of the employment, even if the methods are improper. *See Riniker v. Wilson*, 623 N.W.2d 220, 231 (Iowa Ct. App. 2000). In general, an employee's conduct is within the scope of his or her employment "if it is of the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the master." *Id.* "Within the scope of employment" requires the employee's conduct to be of the same general nature or incidental to the conduct authorized. *Id.*

Courts may consider the following factors in determining whether an employee's conduct is within the scope of employment:

> (1) whether employees commonly perform such an act;
> (2) the time, place and purpose of the act;
> (3) the previous relationship between the employer and employee;
> (4) the extent to which different employees divide the work;
> (5) whether the act is outside the business enterprise or, if within the enterprise, has not been entrusted to the employee;
> (6) whether the employer has reason to expect that such an act will be done;
> (7) the similarity in quality of the act done to the act authorized;
> (8) whether the employer furnished the instrumentality which caused the harm;
> (9) the extent of departure from the normal method of accomplishing an authorized result; and
> (10) whether the act is seriously criminal.

See id. (citing Restatement (Second) of Agency § 229(2) (1957)).

The question whether an employee's act falls within the scope of employment is ordinarily to be decided by a jury. *Id.* But the question may be for the court depending on the surrounding facts and circumstances. *Id.* at 231-32.

The undisputed facts show Lewis was an employee of Hy-Vee on the day of the incident. His job duties included sacking groceries, cleaning, and working at the drive-up. On September 13, 2009, Lewis arrived at the Hy-Vee store around 8:30 a.m. for his shift, which started at 9:00 a.m. Upon realizing he had forgotten part of his work uniform, Lewis said to his supervisor: "Renee, I forgot my belt. Is it okay if I go home and get it before I start my shift?" And she replied: "Yes." Lewis had not clocked in for his shift.

Viewing the evidence in the light most favorable to Jean, we agree with the district court that there is no genuine issue of material fact in dispute. The summary judgment record leaves no doubt that Lewis was acting outside the scope of his employment at the time he rode his bike into Jean. His shift had not yet begun and he was not "on the clock" for his employer. Although Hy-Vee policy dictated that employees wear a particular uniform, the task Lewis was performing at the time of the collision—going home to retrieve part of his uniform—was not a task Lewis was employed to perform.

While Lewis did ask his supervisor's permission to leave, he was not directed to return home to retrieve his belt. Assistant manager Renee Taylor testified she agreed to Lewis's request, but she did not tell him he needed to be

back before the start of his shift, noting: "I was aware of the fact that he would be late if he were to clock in late because he had to go home."

In *Jones v. Blair*, 387 N.W.2d 349, 355 (Iowa 1986), our supreme court explained: "An employee acts within the scope of his employment when the employer has the right to direct the means and manner of doing work, and has the right of control over the employee." The court held that an employee generally is not acting within the scope of employment when commuting to and from work. *Jones*, 387 N.W.2d at 355.

Jean argues this "coming and going rule" does not apply here because Lewis received permission from his supervisor to make the trip. We disagree with the contention that Hy-Vee management directed Lewis to return home. Although Hy-Vee expects its employees to wear a particular uniform, the employer did not control how Lewis obtained his uniform before the start of his shift. Taylor testified that employees who were missing certain pieces of their uniform, for example name tags or ties, could be loaned replacements if the store had them on hand. But the store did not keep belts, shoes, or pants to provide employees. If those items are forgotten, "We can send them home to go get them, if they'd like. If not, they can go without for the day and make sure they have it next time." Taylor testified an issue with the uniform would only be addressed after an employee punched in for his or her shift.

We find no error in the district court's conclusion that Lewis was not acting within the scope of his employment when the collision occurred. He was not clocked in and was not performing any job-related functions. Although he was

hurrying to retrieve part of his work uniform before the start of his shift, Lewis could have done so by riding his bicycle home, by walking, or by arranging for someone to bring his belt to the store. His supervisor did not direct him to ride his bicycle home. The fact that he asked permission rather than affirmatively stating he was leaving and might be a few minutes late does not bring his act within the scope of his employment. There is no dispute in the record that Hy-Vee management would not have given any direction until after the employee started his shift. We affirm the grant of summary judgment on this ground.

B. Whether Hy-Vee was negligent in its care, custody, and control of the store.

Jean next contends the district court erred in granting summary judgment in favor of Hy-Vee on her premises liability claim. She argues the district court analyzed her claim under the wrong legal framework.

In her petition, Jean alleged Hy-Vee was "negligent in the care, custody and control of the premises" where she was injured. In its June 8, 2011, motion for summary judgment, Hy-Vee asserted the following:

> Plaintiff's only remaining claim is for what it calls "premises liability", which is an incorrect characterization of the claim. Because premises liability is concerned with the condition and maintenance of the property, the proper claim would be for liability for actions of a third party. . . . Because the court has already determined Hy-Vee had insufficient knowledge of any possible danger to plaintiff, plaintiff's claim for liability for actions of a third party (or as plaintiff incorrectly calls it, "premises liability") fails as a matter of law.

In its brief supporting the summary judgment motion, Hy-Vee urged the district court to interpret Jean's claim under the standards articulated in *Brokaw*

v. Winfield-Mt. Union Community School District, 788 N.W.2d 386, 392-93 (Iowa 2010), a case involving the risk from actions by a third party.

The district court accepted Hy-Vee's position, concluding:

> When Plaintiff's claim is analyzed for what it truly is—i.e., whether Defendant is liable for the actions of a third party, Bryce Lewis—the Court finds the framework set forth by the *Brokaw* Court is the appropriate framework within which to consider whether Plaintiff's claim should be dismissed as a matter of law.

In *Brokaw*, plaintiffs brought suit against a school district for negligent supervision after one of its basketball players struck Brokaw during a game. *Brokaw*, 788 N.W.2d at 388. In analyzing the plaintiffs' claim, our supreme court relied on section 19 of the Restatement (Third) of Torts, which imposes liability on a defendant where the defendant's actions increase the likelihood that the plaintiff will be injured on account of misconduct of a third party. *Id.* at 391 (citing Restatement (Third) of Torts: Liab. For Physical & Emotional Harm § 19 cmt. e, at 218 (2010)).

The district court determined that Jean failed to show HyVee "had any knowledge that Bryce Lewis might endanger a person, let alone that there was a likelihood of such an incident"—as a result not meeting the foreseeability test outlined in *Brokaw*. *See id.* at 392-93 ("The risk is sufficiently foreseeable to provide a basis for liability when 'the actor [has] sufficient knowledge of the immediate circumstances or the general character of the third party to foresee that party's misconduct.'").

On appeal, Jean contends the district court "ignored the merits of her premises liability claim that she properly plead in her Petition." She goes on to

argue that when her claim is analyzed under the proper framework "it becomes clear that there is a genuine issue of material fact as to whether Hy-Vee was negligent in its care, custody, and maintenance of its store thereby precluding summary judgment."

Jean cites Iowa Civil Jury Instructions 900.1 for her premises liability test:

> The plaintiff must prove all of the following propositions:
> 1. The defendant knew or in the exercise of reasonable care should have known of a condition on the premises and that it involved an unreasonable risk of injury to a person in the plaintiff's position.
> 2. The defendant knew or in the exercise of reasonable care should have known:
> a. the plaintiff would not discover the condition, or
> b. the plaintiff would not realize the condition presented an unreasonable risk of injury, or
> c. the plaintiff would not protect [himself] [herself] from the condition.
> 3. The defendant was negligent in (particular ways).
> 4. The negligence was a cause of the plaintiff's damage.
> 5. The nature and extent of damage.

Jean contends that when viewed in the light most favorable to her case, she presented sufficient evidence to engender a genuine issue of material fact as to whether HyVee knew or should have known of a condition that involved an unreasonable risk to someone in her position. Specifically, she points to evidence from expert witness John Lampe that the location of the bicycle rack in relation to the sidewalk in front of the entrances and the blind corner at the south entrance without a mirror or warning signs combined to create a danger to individuals leaving the store.

The district court did entertain this claim: "Plaintiff has made the argument that there are design flaws in the store that are inherently dangerous and subject

Defendant to liability." But the court rejected it, finding the report by Lampe Consulting only noted what the expert believed to be OSHA (Occupational Safety and Health Administration) violations at the store, which did not support a conclusion that the store design was inherently dangerous to customers. The court further found:

> Even if the conditions at the store are the result of design flaws that are inherently dangerous, the Court finds that when *Brokaw* is applied, the alleged design flaws did not create a physical environment where instances of misconduct are likely to take place, or that may have inadvertently given Bryce Lewis a motive to act improperly. . . . There is no evidence in the record of any other incident of prior problems in the area where Plaintiff incurred her injury.

We agree with Jean that the district court used the wrong analytical framework. The district court erred by trying to shoehorn the facts of this case into the structure of *Brokaw* and section 19 of the Restatement (Third). That section "addresses conduct by defendants that increases the likelihood that the plaintiff will be injured on account of the misconduct of a third party." Restatement (Third) of Torts: Liab. for Physical Harm § 19(e), at 263 (Proposed Final Draft No. 1, 2005) [hereinafter Restatement (Third)]. For the purposes of Jean's claim that HyVee was negligent in its control of the premises, it does not matter whether Lewis engaged in misconduct—even non-negligent action by a passerby could have resulted in Jean being injured because of the alleged deficiencies in the design of the store entrance.

Under the principles of the Restatement (Third)—adopted by our supreme court in *Thompson v. Kaczinski*, 774 N.W.2d 829, 834-35 (Iowa 2009), and reiterated in *Brokaw*—HyVee, as a business that holds its premises open to the

public, owes a duty of reasonable care to those who are lawfully on its premises within the scope of their special relationship.[2] *See* Restatement (Third) § 40(a), (b)(3), at 752-53 (explaining in comment (a) that this section replaces section 344 of the Second Restatement, which imposed a duty of reasonable care on businesses for risks to persons on the premises caused by the conduct of third persons). "The duty of reasonable care includes reasonable care to discover dangerous conditions on the land and to eliminate or ameliorate those that are known or should have been discovered by exercise of reasonable care." *Id*. § 51(i), at 34 (2009). Where reasonable minds can differ in evaluating whether the business owner's conduct lacked reasonable care, the responsibility for making this evaluation rests with the jury. *See id*. § 8(b), at 113 (2005).

The undisputed facts show that at the time of the accident, Lewis was riding his bicycle on the sidewalk that ran in front of the Hy-Vee store entrances. The store had no stated rules against riding a bicycle on the sidewalk and no signs prohibited bicyclists from riding on the sidewalk. Lewis retrieved his bicycle from the store's bicycle rack, which is permanently affixed by the north entrance. Jean was exiting the store from its south entrance as Lewis approached on his bicycle from the north. The collision occurred on the sidewalk.

The design of the south entrance includes a "blind" corner; individuals exiting the store and those approaching on the sidewalk are unable to see each other until rounding that corner. There were no "fish eye" mirrors at the south

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[2] While ordinarily a possessor of land does not owe a duty of reasonable care for risks arising from the conduct of guests, the Restatement (Third) creates an affirmative duty exception for businesses at section 40(b)(3). Restatement (Third) § 51(g), at 32 (2009).

entrance to aid customers in seeing around that corner. Gary McClure, who had been the store director of that Hy-Vee location since 1992, testified there had never been another accident at the south entrance.

In resisting Hy-Vee's motion for summary judgment on her premises liability claim, Jean submitted a safety expert's report. In the report, Lampe opines:

> The bicycle vs. pedestrian impact injury occurred at the unprotected south blind exit from the store. Hy-Vee failed to exercise OSHA's General Duty Clause, Section 5(a)(1), which requires that each employer, "furnish . . . a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

Lampe also states: "Hy-Vee violated the fundamental premise of accident prevention with respect to the area where Ms. Jean suffered impact injury." Lampe's report offered the following hierarchy of accident prevention. Hy-Vee is required to recognize hazards and eliminate them. If the hazard cannot be eliminated, it must be guarded against. If it cannot be guarded against, it must be warned against. And if it cannot be warned against, it must be personally monitored. Lampe states that Hy-Vee failed to conform to these requirements "and that as a consequence the walkway/blind exit was rendered hazardous and that the failures were substantial factors in causing the accident."

The district court erred in dismissing the expert's report as pertaining only to OSHA violations. A violation of an OSHA standard is "evidence of negligence as to all persons who are likely to be exposed to injury as a result of the violation." *See Wiersgalla v. Garrett*, 486 N.W.2d 290, 293 (Iowa 1992).

Viewing the evidence in the light most favorable to Jean, we find there is a question of fact as to whether Hy-Vee exercised reasonable care to discover the danger of the "blind exit" from the store and to eliminate or ameliorate the risk of harm to customers regarding the design and maintenance of its premises. Accordingly, we reverse the district court's order granting summary judgment in favor of Hy-Vee and remand for further proceedings.

C. Whether the district court abused its discretion in dismissing Jean's motion for leave to amend her petition.

Jean filed a motion for leave to amend her petition to add a claim that Hy-Vee was negligent in the training, supervision, and regulation of its employees. The district court denied the motion, finding it had already determined Lewis was not acting within the scope of his employment when it granted Hy-Vee summary judgment on Jean's claim of negligence under the respondeat superior doctrine. Jean argues the court abused its discretion because even though there is some overlap in her claims, her amendment was supported by the evidence.

The district court is afforded considerable discretion in ruling on motions for leave to amend pleadings. *Rife*, 641 N.W.2d at 766. We will only reverse a ruling on such a motion if the record indicates the court clearly abused its discretion. *Id.* An abuse of discretion is found when the court bases its decision on clearly untenable grounds. *Id.*

Iowa Rule of Civil Procedure 1.402(4) allows a party to amend a pleading after a responsive pleading has been served only by leave of court or by written consent of the adverse party. Leave to amend shall be freely given when justice

so requires. *Grace Hodgson Trust v. McClannahan*, 569 N.W.2d 397, 399 (Iowa Ct. App. 1997). Amendments are the rule and denials are the exception. *Id.* The timing of an attempt to amend is not the determinative factor in granting the motion; rather the question is whether the proposed amendment substantially changes the issues before the court. *Allison-Kesley Ag Ctr., Inc. v. Hildebrand*, 485 N.W.2d 841, 845-46 (Iowa 1992).

In denying Jean's motion for leave to amend, the district court found justice did not require granting the motion because it had already determined Lewis's tortious conduct did not occur within the scope of his employment. The ruling concluded: "Further, based on the evidence submitted to the Court there is no evidence that Defendant knew or should have known that Lewis may operate his bicycle as he did."

Causes of action for negligent hiring, supervision, and retention are separate and distinct from those based on respondeat superior liability. *Kiesau v. Bantz*, 686 N.W.2d 164, 172 (Iowa 2004). While the doctrine of respondeat superior imposes strict liability on employers for the acts of their employees committed within the scope of their employment, "[a] cause of action based on negligent hiring, supervision, or retention allows an injured party to recover where the employee's conduct is outside the scope of employment, because the employer's own wrongful conduct has facilitated in some manner the tortious acts or wrongful conduct of the employee." *Id.* To succeed on a claim of negligent hiring, supervision, or retention, "an injured party must show the employee's underlying tort or wrongful act caused a compensable injury, in addition to

proving the negligent hiring, supervision, or retention by the employer was a cause of those injuries." *Id.*

We find the district court abused its discretion in denying Jean's motion for leave to amend her petition to include a claim of negligent training, supervision, and regulation against Hy-Vee. As stated above, whether Lewis was acting within the scope of his employment is not a factor to consider in a negligent training, supervision, and regulation claim. Instead, the question is (1) whether Lewis was acting tortiously, and if so, (2) whether Hy-Vee's negligence in training, supervising, or regulating him facilitated his wrongful conduct.

Here, Jean alleges Lewis acted negligently in riding his bicycle at a high rate of speed on the sidewalk in front of the Hy-Vee entrance. Because Hy-Vee had no policy regarding its employees riding bicycles on the sidewalk and Lewis had never been trained not to ride his bicycle on the sidewalk when coming to and from work, Jean alleges Hy-Vee acted negligently in training, supervising, or regulating Lewis. This claim does not substantially change the issues in the suit. Accordingly, we reverse the district court's order denying the motion for leave to amend.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.