STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-14-99

STEPHEN J. BUSHEY,

Plaintiff

v.

BERLIN CITY OF PORTLAND, INC.

Defendant

ORDER ON MOTION FOR SUMMARY JUDGMENT

Before the court is the defendant's motion for summary judgment. Plaintiff suffered injuries as a result of a car accident while riding in a car owned by defendant and driven by one of defendant's employees. Plaintiff's complaint alleges three theories of liability: negligence (count I), respondeat superior (count II), and negligent entrustment (count III). Defendant has moved for summary judgment, arguing that it is not vicariously liable for its employee's negligence as a matter of law. For the following reasons, defendant is granted summary judgment on count II of plaintiff's complaint.

FACTS

The following facts are supported by the record and presented in a light most favorable to plaintiff as the non-moving party.[1] Plaintiff Stephen Bushey suffered personal injuries as a result of a single-car accident on July 22, 2011 in Gorham. (Def.'s Supp. S.M.F. ¶ 1.) At the time of the accident, David Spiller was driving the car, a Lexus sedan, while plaintiff and Jeffrey Martin were

1 Plaintiff's well-supported additional facts are all admitted because defendant has failed to file a reply statement of material facts. M.R. Civ. P. 56(h)(4).

passengers. (Def.'s Supp. S.M.F. ¶¶ 2-3.) Defendant Berlin City owned the Lexus and David Spiller was an employee of Berlin City. (Def.'s Supp. S.M.F. ¶¶ 2, 5.) There is no dispute that the accident was caused by Spiller's negligent operation of the Lexus. (Def.'s Supp. S.M.F. ¶ 4, as qualified.)

As the used car manager at Berlin City, Spiller was allowed to drive a "demonstrator" vehicle—one of the used vehicles the dealership had in its inventory. (Def.'s Supp. S.M.F. ¶¶ 5-6.) Berlin City allowed certain employees to use demonstrator vehicles as a benefit to those employees and also for business reasons. (Def.'s Supp. S.M.F. ¶ 6, as qualified) Part of Spiller's job was to test used vehicles and make sure that they did not have any mechanical problems. (Pl.'s Add. S.M.F. ¶¶ 9-11.)

On Friday July 22, 2011, Spiller clocked out of work at 6:26pm and drove home in the Lexus. (Def.'s Supp. S.M.F. ¶¶ 13-14.) Spiller took the Lexus that weekend in part to inspect it for mechanical defects and in part because he wanted to drive a nice car for the weekend. (Pl.'s Add. S.M.F. ¶ 68.) On his way home, Martin invited Spiller to have drinks with Martin and plaintiff at Thatcher's in Westbrook. (Def.'s Supp. S.M.F. ¶ 16.) Spiller went home to shower and change and then drove to Thatcher's to meet his two friends. (Def.'s Supp. S.M.F. ¶ 17.) The three friends ordered food and drinks at the bar.[2] (Def.'s Supp. S.M.F. ¶ 18.)

While at Thatcher's, Spiller showed off the Lexus to waitresses and other customers. (Pl.'s Add. S.M.F. ¶¶ 2-3.) According to Martin, Spiller was

2 The amount of alcohol Spiller consumed is not in the summary judgment record.

promoting Berlin City's business generally and telling everyone he met there that he was a salesman. (Pl.'s Add. S.M.F. ¶¶ 4, 6.)

Around 11:00 pm, Spiller, Martin, and plaintiff left Thatcher's in the Lexus. (Def.'s Supp. S.M.F. ¶ 19.) The plan was for Spiller to drive Martin and plaintiff to his house and then the three friends would make a plan for the rest of the night. (Pl.'s Add. S.M.F. ¶ 85.) The accident occurred while Spiller was driving to his house from Thatcher's. (Def.'s Supp. S.M.F. ¶¶ 20.) Spiller admits that he was driving well over the speed limit when he crashed. (Pl.'s Add. S.M.F. ¶ 51.) He denies that he was intoxicated. (Pl.'s Add. S.M.F. ¶ 50.)

Berlin City's only alcohol policy regarding demonstrator vehicles is that an employee cannot be intoxicated while driving a demonstrator. (Pl.'s Add. S.M.F. ¶¶ 13, 30.) Berlin City fired an employee in July 2009 because he was convicted of OUI. (Pl.'s Add. S.M.F. ¶ 20.) Speeding violates the company's demonstrator policy, but Berlin City leaves it up to its insurer to decide whether an employee is too much of a risk to drive a demonstrator as a result of a speeding violation. (Pl.'s Add. S.M.F. ¶ 32.)

Eric Johnson interviewed Spiller before he was hired by Berlin City. (Pl.'s Add. S.M.F. ¶ 25.) He is not sure whether Berlin City obtained Spiller's driving record before he was hired. (Pl.'s Add. S.M.F. ¶ 25.) Berlin City did not perform background checks on employees at the time it hired Spiller. (Pl.'s Add. S.M.F. ¶ 26.)

Since 1991, Spiller has had multiple speeding convictions. (Pl.'s Add. S.M.F. ¶ 71.) In August 2008, Spiller received a summons for driving 94 mph in a 65 mph zone. (Pl.'s Add. S.M.F. ¶ 73.) Spiller was arrested for OUI in September of 2000 but was not convicted. (Pl.'s Add. S.M.F. ¶ 83.)

DISCUSSION

1. Standard of Review

"Summary judgment is appropriate if the record reflects that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Dussault v. RRE Coach Lantern Holdings, LLC*, 2014 ME 8, ¶ 12, 86 A.3d 52 (quoting *F.R. Carroll, Inc. v. TD Bank, N.A.*, 2010 ME 115, ¶ 8, 8 A.3d 646). "A material fact is one that can affect the outcome of the case, and there is a genuine issue when there is sufficient evidence for a fact-finder to choose between competing versions of the fact." *McIlroy v. Gibson's Apple Orchard*, 2012 ME 59, ¶ 7, 43 A.3d 948 (quoting *N. E. Ins. Co. v. Young*, 2011 ME 89, ¶ 17, 26 A.3d 794). "Even when one party's version of the facts appears more credible and persuasive to the court, any genuine factual dispute must be resolved through fact-finding, regardless of the nonmoving party's likelihood of success." *Lewis v. Concord Gen. Mut. Ins. Co.*, 2014 ME 34, ¶ 10, 87 A.3d 732. "To survive a defendant's motion for a summary judgment, the plaintiff must establish a prima facie case for each element of her cause of action." *Lougee Conservancy v. CitiMortgage, Inc.*, 2012 ME 103, ¶ 12, 48 A.3d 774 (quoting *Bonin v. Crepeau*, 2005 ME 59, ¶ 8, 873 A.2d 346).

2. Respondeat Superior (Count II)

Defendant's motion is limited to whether it can be held vicariously liable for Spiller's negligence.[3] Maine follows the Restatement on questions of vicarious liability. *Spencer v. V.I.P., Inc.*, 2006 ME 120, ¶ 6, 910 A.2d 366. An

3 Defendant does not make any arguments regarding whether it was directly negligent (count I) or on plaintiff's negligent entrustment theory (count III). Accordingly, the court construes defendant's motion as limited to count II of plaintiff's complaint.

employer is liable "only if its employee's action occurred within the scope of employment." *Id.* Under the Restatement, 'an employee's action occurs within the scope of employment if (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated at least in part by a purpose to serve the master.'" *Id.* (quoting Restatement (Second) of Agency § 228(1) (1958)). In *Spencer*, the court held that an employer could be held liable for an employee's negligent driving where the employee was driving home after working at an event for the employer. *Id.* ¶¶ 7-9.

While the court can find no Maine decisions that address vicarious liability in the context of the use of a demonstrator vehicle, other jurisdictions have addressed the issue. In *Hale v. Spitzer Dodge, Inc.*, a car salesperson was driving a demonstrator on his day off from work when he collided with another car. *Hale v. Spitzer Dodge, Inc.*, 2006 Ohio App. LEXIS 3246, at *2-3 (Ohio Ct. App. 2006). The car had a dealer plate on the back, the dealer's logo on the front, and a price sticker in the window. *Id.* at *3. There was evidence that the salesperson was always looking for sales opportunities while driving a demonstrator, the demonstrators were good advertising for the dealership, and they were also an employee benefit. *Id.* at *3-4. The court held that, despite the incidental benefits to the employer from allowing employees to use the demonstrators, the salesperson's conduct "was outside the scope of his employment at the time of the accident." *Id.* at *18.

Other courts have likewise concluded that, while a salesperson is driving a demonstrator vehicle for personal use, the employer is not liable for that employee's negligence. *See Easterling v. Man-O-War Auto., Inc.*, 223 S.W.3d 852,

856 (Ky. Ct. App. 2007); *State ex rel. City Motor Co. v. District Court*, 530 P.2d 486, 489 (Mont. 1974); *Di Ferdinando v. Katzman*, 1998 Del. Super. LEXIS 19, at *5 (Del. Super. Ct. 1988). In cases where the court concluded the employer could be held liable, there are some facts that establish the employee was in some way serving the employer's interests. *See Pfender v. Torres*, 765 A.2d 208 (N.J. Super. Ct. 2001) (employee was driving to work at time of accident and was required to use the car in the performance of employment); *see also Spencer*, 2006 ME 120, ¶ 9, 910 A.2d 366 (employee's travel was necessary for employee to assist employer in setting up for an event).

In this case, there is no evidence that at the time of the accident Spiller was serving the interests of Berlin City. The evidence shows without dispute of fact that Spiller was driving home with his two friends from the bar around 11:00pm. There is no evidence that he was attempting to sell one of his two friends the car or that he was going to show the car to anyone else that evening.

Plaintiff argues that there is evidence that Spiller was showing the car off to people at Thatcher's and was generally promoting Berlin City's business at the bar. Accepting these facts as true, these types of interactions are an incidental benefit of allowing employees to use a demonstrator vehicle and are insufficient on their own to generate an issue of material fact that Spiller was working within the scope of employment when he was driving home from the bar where he happened to show the car to bar patrons. There is no evidence that Berlin City required or encouraged its employees to go to bars or restaurants to sell cars and

there is no evidence that Spiller had any plan to meet a prospective buyer that night. Berlin City is entitled to judgment on count II of plaintiff's complaint.[4]

CONCLUSION

Plaintiff has failed to generate a genuine issue of material fact that Spiller was working within the scope of his employment at the time of the accident. Accordingly, defendant is entitled to summary judgment on count II of the complaint. Because counts I and III of the complaint are not based on vicarious liability, defendant is not entitled to judgment on those counts.

The entry is:

Defendant's motion for summary judgment is granted on count II of plaintiff's complaint.
Counts I and III of plaintiff's complaint remain and will proceed according to this court's scheduling order.

Date: 4/19/15

Joyce A. Wheeler
Active Retired Justice, Superior Court

Plaintiff-Peter Clifford Esq
Defendant-Martica Douglas Esq

4 Plaintiff's argument that 29-A M.R.S. § 904 and 29-A M.R.S. § 1653 apply to Berlin City is not persuasive and is adequately addressed by the court's opinion.