STATE OF MICHIGAN

COURT OF APPEALS

LINDA ENDERS,

Plaintiff-Appellant,

v

LYNN MARIE BORG, DANIEL BORG, and MARTIN HADDAD,

Defendants,

and

COMMUNITY FOUNDATION OF ST. CLAIR COUNTY,

Defendant-Appellee.

UNPUBLISHED
September 23, 2014

No. 314570
St. Clair Circuit Court
LC No. 10-001567-NI

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Plaintiff, Linda Enders, appeals as of right from the stipulated order dismissing without prejudice her claims against Lynn Borg and Daniel Borg, which comprised the final order in this third-party automobile negligence case. On appeal, plaintiff challenges the grant of summary disposition in favor of defendant, Community Foundation of St. Clair County (the Foundation), alleging the existence of genuine issues of material fact premised on admissions by defendant Lynn Marie Borg (Borg) and her status as an agent of the Foundation and the denial of requested discovery sanctions. We affirm.

Plaintiff contends that the trial court erred in granting summary disposition in favor of the Foundation because a genuine issue of material fact existed whether Borg became intoxicated immediately preceding the accident while engaged in a business meeting in the course and scope of her employment. Plaintiff further contends that inconsistencies between Borg's statements to the police and an insurance adjuster indicating she was at a business meeting from those she later made under oath denying her involvement in a business meeting before the accident were admissions attributable to the Foundation as her employer and comprised issues of credibility, rendering the grant of summary disposition inappropriate.

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). Summary disposition motions brought pursuant to MCR 2.116(C)(10) test the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court "review[s] a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*.; see also MCR 2.116(C)(10). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Within approximately one hour of the accident, Borg was interviewed by the police and admitted that she had consumed alcohol while attending a business meeting. Two or three days later, while in a telephone interview with her insurance adjuster, Borg responded affirmatively when asked if she had consumed the alcohol while at a business meeting. However, at her deposition one year later, Borg denied being at a work function before the accident, asserting her meeting with Martin Haddad was "social." She denied anyone from the Foundation was present at the bar or that her meeting with Haddad involved any Foundation business. During her deposition, Borg acknowledged speaking with her insurance company by telephone shortly following the accident and indicating her understanding that her statement was being recorded. When Borg was deposed a second time, approximately 10 months later, Borg confirmed she was at the bar for a "private meeting" with Haddad and denied that she was there on behalf of the Foundation or was conducting any business on her employer's behalf. Borg asserted she was separated from her husband at the time of the accident and that he was aware she was dating but may not have specifically known she was involved with Haddad. Borg indicated that she met with Haddad that evening after she had visited a hair salon next door. Borg acknowledged that her statement on the night of the accident to the sheriff regarding her involvement in a business meeting immediately before the accident was untrue. Borg denied, however, that her statement to the police was motivated by her concern that her husband not learn of her relationship with Haddad. Borg could not recall making the statement to the deputy, but when questioned offered various explanations for indicating her participation in a business meeting, including the visible nature of her job and the importance of her reputation in the community.

Plaintiff contends that Borg's inconsistent statements create a genuine issue of material fact and comprise an issue of credibility, precluding summary disposition. "A court is not permitted to assess credibility, or to determine facts on a motion for summary disposition. Instead, the court's task is to review the record evidence and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Lima Twp v Bateson*, 302 Mich App 483, 492; 838 NW2d 898 (2013) (internal quotation marks and citation omitted). While on a superficial level, this rule would appear to necessitate a reversal of the trial court's ruling, Borg's statements must be placed in the proper factual and legal context to properly evaluate whether the statements are sufficient to establish a genuine issue of fact with regard to the Foundation's alleged vicarious liability. See *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 474-475; 776 NW2d 398 (2009).

Plaintiff uses the doctrine of respondeat superior to impose vicarious liability on the Foundation for the wrongful acts of Borg alleged to have been performed during the scope of her employment. "Under the doctrine of respondeat superior, an employer may be vicariously liable for the acts of an employee committed within the scope of his employment." *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). Liability arising under principles of respondeat superior or the imposition of vicarious liability against an employer "is based upon principal-agent and master-servant relationships and involves the imputation of negligence of the agent or servant to the principal or master without regard to the fault of the principal or master." *McClaine v Alger*, 150 Mich App 306, 316-317; 388 NW2d 349 (1986). As a general precept, " 'a master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment.' " *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002), quoting *Murphy v Kuhartz*, 244 Mich 54, 56; 221 NW 143 (1928). Vicarious liability can arise where an employee's action was not specifically authorized if the act is similar or incidental to conduct that is authorized, considering factors such as whether the act is commonly done by the employee or whether the employee could in some way have been promoting or furthering the employer's business. *Bryant v Brannen*, 180 Mich App 87, 98-100; 446 NW2d 847 (1989), citing 1 Restatement Agency, 2d, § 229, p 506. Liability will not be imposed on an employer, however, for an employee's tortious acts that are committed outside the scope of employment, for example, where the employee was acting to accomplish his or her own purpose. *Rogers*, 466 Mich at 651; *Salinas v Genesys Health Sys*, 263 Mich App 315, 317; 688 NW2d 112 (2004); *Green v Shell Oil Co*, 181 Mich App 439, 446-447; 450 NW2d 50 (1989). "While the issue of whether the employee was acting within the scope of his employment is generally for the trier of fact, the issue may be decided as a matter of law where it is clear that the employee was acting to accomplish some purpose of his own." *Bryant*, 180 Mich App at 98.

The only evidence that plaintiff cites in support of her position are the initial statements made by Borg to the deputy immediately following her accident and to the insurance adjuster. Borg subsequently recanted that she was involved in a business meeting before the accident. Haddad, the only other person present for the events preceding the accident, also denied that his meeting with Borg pertained to the Foundation and there is no evidence or suggestion that Haddad had any professional association with the Foundation independently or through his employer. All documentation and testimony elicited from individuals in authority with the Foundation indicate there was no record of the Foundation sponsoring an event at the time and place in question or that anyone else, either as an employee or donor of the Foundation, was present. Further, there is no evidence that the Foundation was aware that Borg was meeting with Haddad and her activities suggest that she had completed work and was engaged in personal business having procured a haircut and meeting her paramour for a drink at a convenient location. Although Borg's consumption of alcohol was conduct generally permitted by the Foundation during sponsored events or with clients and potential donors, her consumption of alcohol to the point of intoxication exceeded the Foundation's authorization. Moreover, the alcohol consumed in this incident was not provided by the Foundation, as it was definitively established that Haddad purchased the beverages for Borg. Finally, there is no record or indication of any business or interest pertaining to the Foundation that was pursued between Borg and Haddad at the bar. It is clear from the record that Borg was acting to accomplish a purpose of her own and was not acting within the scope or authority of her employment. Accordingly, we conclude that summary disposition was properly granted.

Plaintiff further asserts a rather convoluted argument that Borg's statements to the police and insurance adjuster comprised admissions that are, because of her status as an agent of the Foundation, attributable to the Foundation, and thus, establish vicarious liability. Plaintiff, however, ignores that Borg's statements were made as an individual, not under oath, and were not ratified by the Foundation. In fact, the Foundation specifically contested Borg's statement that she was participating in a business meeting immediately before the accident. Further, there is no indication that when Borg was being interviewed, either by the deputy or the insurance adjuster, that she was putting herself forth as an employee or agent of the Foundation or was speaking on its behalf. Borg's husband, not the Foundation, was the owner of the vehicle driven and insured by Borg on the night of the accident. The police report does not reference Borg's employer or employment status. Contrary to plaintiff's position, there is no evidence or suggestion that the Foundation had any awareness of Borg's involvement with Haddad, or her statements, until after they were made and plaintiff's lawsuit was amended, approximately 19 months after the accident occurred. The Foundation, following service of process, immediately denied Borg's participation in a Foundation event or employment activity before the accident. "Ratification" is defined as "the affirmance by a person of a prior act which did not bind him, but which was done or professed to be done on his account," Restatement Agency, 2d, § 82, p 210, and it "only takes place with full knowledge of the facts." *Moore v Mitchell*, 278 Mich 10, 20; 270 NW 197 (1936); see also *Cudahy Bros Co v West Mich Dock & Market Corp*, 285 Mich 18, 25; 280 NW 93 (1938). Accordingly, there is no indication that Borg's statements were admissions attributable to the Foundation.

Plaintiff also makes extensive arguments regarding various rules of evidence. Specifically, plaintiff argues Borg's statements were admissible as the admissions of a party opponent pursuant to MRE 801(d)(2)(D). Plaintiff argues that Borg's admissions constituted "binding vicarious admissions of an authorized agent under MRE 801(d)(2)(C)" and were also admissible in accordance with MRE 803(24). These claims are without merit. The rules of evidence relied upon by plaintiff require acceptance of plaintiff's initial premise that Borg, as an agent of the Foundation, was authorized to make the statements, and as discussed, there is no evidence that the Foundation was involved or that it authorized Borg to make the statements to the deputy and insurance adjuster. Borg was conducting personal business outside the scope of her employment, and as we determined, the statements are not attributable to the Foundation.

Plaintiff next contends that the trial court should have granted her request for sanctions against the Foundation for its discovery violations. We conclude that plaintiff failed to demonstrate an abuse of discovery by the Foundation, and therefore, was not entitled to sanctions.

Plaintiff requested a default judgment as a possible sanction for alleged discovery violations by the Foundation, which the trial court denied. A trial court's decision to grant or deny a default judgment as a sanction for discovery abuses is reviewed by this Court for an abuse of discretion. *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 396; 484 NW2d 718 (1992).

> Default judgment is a possible sanction for discovery abuses. It is, however, a drastic measure and should be used with caution. When the sanction of a default judgment is contemplated, the trial court should consider whether the

> failure to respond to discovery requests extends over a substantial period of time, whether there was a court order directing discovery that has not been complied with, the amount of time that has elapsed between the violation and the motion for default judgment, and whether wilfulness has been shown. The court must also evaluate on the record other available options before concluding that a drastic sanction is warranted. The sanction of default judgment should be employed only when there has been a flagrant and wanton refusal to facilitate discovery, that is, the failure must be conscious or intentional, not accidental or involuntary. [*Id.* at 396-397 (citations omitted).]

Initially, plaintiff contends the Foundation knew of Borg's statements to police and the insurance adjuster, yet testimony by everyone associated with the Foundation indicates they were not aware of Borg's statements until the Foundation was served with the lawsuit in May 2011, or 18 months after Borg had made the contested statements. Plaintiff also contends that the Foundation obstructed discovery by refusing to answer questions that Borg was authorized by the Foundation to tell the insurance adjuster and the deputy that she was drinking at a business meeting. Plaintiff only focuses on the testimony of Donald Fletcher, the chairman of the Board of Trustees for the Foundation. However, plaintiff's presentation of her arguments on appeal misrepresents and mischaracterizes the lower court record. In actuality, plaintiff's counsel during Fletcher's deposition repeatedly posed hypothetical questions not premised on facts in evidence, and thus, the Foundation's counsel objected in this regard. Further, contrary to plaintiff's contention, Fletcher did respond to one of the inquiries, explaining,

> I'm very concerned that you're asking me if we would authorize her to say this. You know, she was not at a business meeting. She testified to that affect [sic]. We also have records that indicate that she was not. So why would I comment on that [sic] that we would authorize her to say that when there wasn't a business meeting[?]

There is no indication that the Foundation obstructed discovery when it was simply objecting to inappropriate questions posed by plaintiff's counsel and where there is testimony that Borg was not authorized by the Foundation to make the statements.

Plaintiff further speculates that the Foundation failed to produce or purposefully destroyed evidence of meetings pertaining to Borg's involvement in the accident, premised in part on her assumption that Randy Maiers, the Foundation's president and chief executive officer, "was the type of person that is going to document anything that has a potential significant effect on the Foundation." However, contrary to plaintiff's assertions, testimony by Maiers and others on behalf of the Foundation consistently did not recall discussing this topic on an ongoing basis once they had determined how to address potential media coverage of Borg's accident and before they were aware of any implication by Borg to the deputy or her insurance adjuster that she was attending a "business" meeting before the accident. The only person acknowledging that he may not have retained emails incidental to this matter was Charles Kelly, the Chairman of the Foundation's Board of Trustees at the time of Borg's accident, because he typically deleted such correspondence and was not aware until months later that the Foundation was named as a party to the lawsuit.

Similarly, assertions by plaintiff that Maiers was uncooperative with discovery is contrary to his testimony at deposition. Maiers asserted that he had produced his own e-mails pertinent to this matter, and agreed to produce Borg's e-mails to the extent it did not violate any laws. He also agreed to investigate whether the Foundation had receipts from the Quay Street Brewery for events or reimbursement to employees for 2009 and to produce them for plaintiff. Notably, although plaintiff filed a motion for sanctions expounding on a myriad of alleged discovery violations by the Foundation, a motion to compel production is not present in the record. On this record, there is no evidence that the Foundation destroyed, or failed to produce, evidence of meetings pertaining to Borg's accident.

Plaintiff further contends that she was entitled to a favorable presumption premised on the Foundation's destruction of possible evidence. While a trial court possesses the authority to sanction a party for failing to preserve evidence, *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997), in this instance, plaintiff has failed to demonstrate that evidence actually existed that was destroyed, other than her speculation. Therefore, we conclude that the trial court did not abuse its discretion by denying plaintiff's request for a default judgment and other sanctions.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell