Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00568-CV

Selena **PESQUEDA**, Individually and on Behalf of Baltasar Pesqueda, Jr., Deceased, and as Next Friend of Derey Ramirez and Izayah Ramirez, Minors,
Appellants

v.

Oscar Ramiro **MARTINEZ**,
Appellee

From the 57th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CI05581
Honorable Richard Price, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: November 29, 2017

AFFIRMED

Baltasar Pesqueda, Jr. was the passenger in a company vehicle being driven by Oscar Ramiro Martinez when Martinez veered into oncoming traffic and collided with a tractor-trailer. Baltasar died as a result of the accident, and his beneficiaries were paid workers' compensation death benefits. In this appeal, Baltasar's wife, Selena Pesqueda, individually and on behalf of Baltasar, and as next friend of their minor children Derey Ramirez and Izayah Ramirez, contends the trial court erred in granting summary judgment in favor of Martinez because her receipt of the workers' compensation death benefits did not conclusively establish an affirmative defense in

Martinez's favor. Specifically, Selena argues the summary judgment evidence did not conclusively establish Martinez was in the course and scope of his employment with the company at the time of the collision. We affirm the trial court's judgment.

BACKGROUND

On June 7, 2013, Baltasar, Martinez, Roy Longoria, Jr., and David Rendon were traveling to a job site in a vehicle owned by their employer Utility Lines Construction Services, Inc. (the "Company") with Martinez driving. Martinez veered into oncoming traffic and collided with a tractor-trailer. Baltasar died as a result of the injuries he sustained in the collision.

Selena retained an attorney and filed a beneficiary claim for workers' compensation death benefits. After a dispute arose regarding Baltasar's average weekly wage, Selena's attorney requested a benefit review conference to resolve the dispute; however, the parties subsequently entered into a benefit dispute agreement. It is undisputed that the Company's insurance carrier paid Selena workers' compensation death benefits.[1]

On April 6, 2015, Selena filed the underlying lawsuit alleging various claims against numerous defendants, including a negligence claim against Martinez. Martinez filed a motion for summary judgment asserting Selena's recovery of the workers' compensation death benefits was her exclusive remedy pursuant to section 408.001 of the Texas Workers' Compensation Act. Alternatively, Martinez asserted Selena's claim was barred by her election of remedies. The trial court granted Martinez's motion and severed Selena's claims against Martinez from her claims against the remaining defendants. Selena appeals.

STANDARD OF REVIEW

"We review the grant of [a] summary judgment de novo." *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015). To prevail on a traditional motion for summary

[1] Martinez was also injured in the accident and was paid workers' compensation benefits.

judgment, the movant must show "there is no genuine issue as to any material fact and the [movant] is entitled to judgment as a matter of law." TEX. R. CIV. P. 166a(c). In reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, resolve all conflicts in the evidence in the nonmovant's favor, and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Katy Venture, Ltd.*, 469 S.W.3d at 163.

EXCLUSIVE REMEDY

The exclusive remedy provision set forth in section 408.001(a) of the Texas Workers' Compensation Act ("Act") provides:

> Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or the agent of the employer for the death of or a work-related injury sustained by the employee.

TEX. LAB. CODE ANN. § 408.001(a) (West 2015). "Historically, this exclusive remedy provision has provided a legislatively-crafted compromise that relieves employees of the burden of proving negligence to obtain relief for workplace injuries but, in return, they forego any remedies except as may be provided in the Act." *Aguirre v. Vasquez*, 225 S.W.3d 744, 750-51 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *see also Port Elevator-Brownsville v. Casados*, 358 S.W.3d 238, 241 (Tex. 2012) (noting legislature intended the Act to benefit both employees and employers).

A. Parties' Arguments

In her first issue, Selena acknowledges her receipt of workers' compensation death benefits calls into question the applicability of the exclusive remedy provision. However, Selena contends Martinez would only be entitled to rely on the exclusive remedy defense if he established that he was in the course and scope of his employment at the time of the collision. Martinez responds Selena is "effectively estopped" to deny that Martinez was in the course and scope of his

employment at the time of the collision since it would be "illogical" to assert that, "unlike her husband, Mr. Martinez was not in the course and scope of his employment, while the two traveled together in the same vehicle, to the same designation and for the same purpose."

B. Extension of Exclusive Remedies Provision to Martinez

Although section 408.001(a) of the Act extends the exclusive remedy defense to "an agent or employee of the employer," the Texas Supreme Court, in addressing the predecessor to section 408.001, held that an agent or employee within the meaning of the statute "is ordinarily one for whose conduct the employer would, aside from the [Act], be legally responsible under the doctrine of respondeat superior." *McKelvy v. Barber*, 381 S.W.2d 59, 62 (Tex. 1964); *see also Arnold v. Gonzalez*, No. 13-13-00440-CV, 2015 WL 5109757, at *2 (Tex. App.—Corpus Christi Aug. 28, 2015, pet. granted, abated pending settlement) (mem. op.) (noting exclusive remedy provision only extends to co-employees "for whose conduct the employer is legally responsible under the doctrine of respondeat superior"); *Burkett v. Welborn*, 42 S.W.3d 282, 288 (Tex. App.—Texarkana 2001, no pet.) (noting "employee of the employer" under section 408.001(a) "refers to a co-employee for whose conduct the employer is legally responsible under the doctrine of *respondeat superior*") (emphasis in original); *Wright v. Toomey*, No. 04-98-00383-CV, 1998 WL 877549, at *2 (Tex. App.—San Antonio 1998, no pet.) (not designated for publication) (applying holding in *McKelvy* to section 408.001(a)); *cf. Aguirre*, 225 S.W.3d at 753 (distinguishing cases addressing fact situations in which the co-employees were not determined to be in the course and scope of employment in holding Act provided exclusive remedy against co-employee). "[I]n order to impose liability upon an employer for the negligence of an employee under the doctrine of respondeat superior[,] the negligent act must fall 'within the scope of the general authority of the employee.'" *Wright*, 1998 WL 877549, at *2 (quoting *Leadon v. Kimbrough Bros. Lumber Co.*, 484 S.W.2d 567, 569 (Tex. 1972)).

To fall within the scope of the employee's general authority, "[i]t is not essential that the negligent act or omission should have been expressly authorized by the employer so long as it is in furtherance of the employer's business and for the accomplishment of the object for which the employee is employed." *Leadon*, 484 S.W.2d at 569. Therefore, in order to successfully establish the exclusive remedy defense, Martinez was required to prove his driving the Company's vehicle was in furtherance of the Company's business and for the accomplishment of the object for which he was employed. *Wright*, 1998 WL 877549, at *2; *see also Long v. Turner*, 871 S.W.2d 220, 224-25 (Tex. App.—El Paso 1993, writ denied) (holding exclusive remedy defense was conclusively established where summary judgment evidence led to the inescapable conclusion that co-employee's negligent act was within the scope of his authority and in furtherance of the employer's business).

C. Martinez's Burden

Although instinctively it may seem illogical to argue Baltasar was within the course and scope of his employment when the collision occurred but Martinez was not, Martinez had the burden as the summary judgment movant to conclusively establish that he was entitled to judgment as a matter of law. In order to meet this burden, Martinez was required to conclusively establish that driving the Company's vehicle was in furtherance of the Company's business and for the accomplishment of the object for which he was employed.

We next consider whether Martinez met this burden entitling him to summary judgment.

DID MARTINEZ CONCLUSIVELY ESTABLISH THE EXCLUSIVE REMEDY DEFENSE?

In her second issue, Selena contends Martinez failed to conclusively establish that he was within the course and scope of his employment at the time of the collision. Martinez counters that he met his summary judgment burden.

A. Course and Scope of Employment

As previously noted, Martinez had the burden to conclusively establish that his driving the Company's vehicle was in furtherance of the Company's business and for the accomplishment of the object for which Martinez was employed. *Leadon*, 484 S.W.2d at 569; *Wright*, 1998 WL 877549, at *2. In the workers' compensation context, we believe this is the same burden imposed in determining whether an employee has sustained an injury arising out of and in the course and scope of his employment. *See Am. Cas. Co. v. Bushman*, 480 S.W.3d 667, 673 (Tex. App.—San Antonio 2015, no pet.).

The Act defines "course and scope of employment" as follows:

> . . . an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of the employer or at other locations. The term does not include:
>
> (A) transportation to and from the place of employment unless:
>
> (i) the transportation is furnished as a part of the contract of employment or is paid for by the employer;
>
> (ii) the means of the transportation are under the control of the employer; or
>
> (iii) the employee is directed in the employee's employment to proceed from one place to another place; or
>
> (B) travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless:
>
> (i) the travel to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be furthered by the travel; and
>
> (ii) the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel.

TEX. LAB. CODE ANN. § 401.011(12). This court has held the following three-step analysis applies in "[d]etermining whether an activity is in the course and scope of employment:"

> The first step requires determining whether the activity (1) originates in the employer's work, business, trade, or profession and (2) furthers the employer's affairs. If these two elements are satisfied, then the activity is in the course and scope of employment unless one of section 401.011(12)'s exclusions applies. The second step is to determine whether one of the two exclusions applies: the "coming and going" exclusion or the "dual-purpose travel" exclusion. The two exclusions are mutually exclusive; that is, if the "coming and going" rule applies, then the "dual purpose travel" exclusion does not, and vice versa. If an exclusion applies, then the employee's activity is not in the course and scope of employment unless an exception to the exclusion applies. Therefore, the third step is to determine whether an exception to the exclusion applies.

Am. Cas. Co., 480 S.W.3d at 673-74 (internal citations omitted).

B. *SeaBright Ins. Co. v. Lopez*

In *SeaBright Ins. Co. v. Lopez*, 465 S.W.3d 637, 639 (Tex. 2015), the Texas Supreme Court addressed "whether summary judgment evidence conclusively established that an employee was acting in the course and scope of his employment when he died in an automobile accident while traveling to a job site." In that case, Candelario Lopez was employed by Interstate Treating, Inc. *SeaBright Ins. Co.*, 465 S.W.3d at 640. Lopez resided in Rio Grande City, Texas, but Interstate Treating assigned him to work at remote job sites. *Id*. "Lopez made his own living arrangements . . . and Interstate Treating paid [him] an hourly wage plus [a] per diem for his lodging and food expenses." *Id*. Interstate Treating provided Lopez "with a company vehicle to use at the remote job locations, but Lopez was not paid for any time traveling to or from the job site." *Id*.

In September 2007, Lopez was assigned to work on a job site approximately 450 miles from his home. *Id*. Lopez chose to stay at a motel approximately forty miles away from the job site, and Interstate Treating allowed Lopez to use a company vehicle to drive between the motel and the job site. *Id*. Interstate Treating provided Lopez with a credit card to pay for fuel. *Id*. "Although Interstate Treating had no express policy regarding carpooling, the use of company

vehicles to transport employees to and from remote job sites was a common occurrence," and Lopez often allowed other employees to ride with him to the job site. *Id*. On September 11, 2007, Lopez was transporting two other employees to the job site when he died in an automobile accident. *Id*.

Lopez's wife Maximina sought death benefits from Interstate Treating's workers' compensation insurance carrier, SeaBright Insurance Co. *Id*. SeaBright denied coverage, contending Lopez was not acting in the course and scope of his employment at the time of the accident. *Id*. Maximina challenged the decision through administrative proceedings, and an Appeals Panel affirmed a hearing officer's decision that Lopez was acting in the course and scope of his employment. *Id*. SeaBright sought judicial review of the administrative decision, and the trial court granted summary judgment in favor of Maximina which the intermediate appellate court affirmed. *Id*. at 641.

The Texas Supreme Court held that to meet the statutory definition of "course and scope," the injury must: "'(1) relate to or originate in, and (2) occur in the furtherance of, the employer's business.'" *Id*. at 642 (quoting *Leordeanu v. Am. Prot. Ins. Co.*, 330 S.W.3d 239, 241 (Tex. 2010)). Although recognizing an employee's travel to and from work generally does not originate in an employer's business, the court noted travel can originate in an employer's business when the travel was "'pursuant to express or implied conditions of [the employee's] employment contract.'" *Id*. (quoting *Meyer v. W. Fire Ins. Co.*, 425 S.W.2d 628, 629 (Tex. 1968)). The court further noted courts generally employ "a fact-intensive analysis to determine whether an employee's travel originated in the employer's business, focusing on the nature of the employee's job, the circumstances of the travel, and any other relevant facts." *Id*. at 642-43.

In undertaking its analysis, the court first considered the nature of Interstate Treating's business and concluded the business "called for employing specialized, non-local work crews in

constantly changing, remote locations on temporary assignments." *Id*. at 643-44. The court next addressed the nature of Lopez's employment, noting he was the civil foreman on a temporary, remote job site, and Interstate Treating expected him to secure temporary lodging and provided him with a company vehicle to drive to and from the job site. *Id*. at 644. The court concluded, "Lopez's travel from his temporary housing to the [] job site and, more importantly, the risks associated with such travel were dictated by Interstate Treating's business model and enabled by Interstate Treating's provision of the vehicle and payment of per diem and other expenses." *Id*. Because the very nature of the work Lopez performed required his travel, the court held Maximina conclusively established the origination element. *Id*.

The court next considered the furtherance element, noting "'[a]n employee's travel to and from work makes employment possible and thus furthers the employer's business." *Id*. (quoting *Leordeanu*, 330 S.W.3d at 242)). Because Lopez was traveling to the job site when he died, the court held Maximina conclusively established the furtherance element. *Id*. at 644-45.

Finally, the court considered the exclusions and exceptions contained in section 401.011(12)(A)-(B) of the Act. *Id*. at 645 (noting subsection (A) applies to travel to and from the place of employment, i.e., the "coming and going" exclusion, and subsection (B) applies to dual-purpose travel when an employee is also furthering his personal or private affairs). Because Lopez was traveling only to his place of employment, the court concluded his travel implicated the subsection (A) exclusion. *Id*. Because Interstate Treating provided Lopez with a company vehicle to drive to and from the job site and paid the vehicle's fuel and insurance expenses, however, the court held Maximina conclusively established the exception to the "coming and going" exclusion set forth in subsection (A)(i) which is applicable when the transportation is paid for by the employer. *Id*.

C. Summary Judgment Evidence and Analysis

Applying the "course and scope" analysis to the facts in this case, and taking as true all evidence favorable to Pesqueda, resolving all conflicts in the evidence in her favor, and indulging every reasonable inference and resolving all doubts in Pesqueda's favor, *see Katy Venture, Ltd.*, 469 S.W.3d at 163, we first consider whether the travel to the job site originated in the Company's business, then whether Martinez established the furtherance element, and, finally, we consider the exclusions and exceptions contained in section 401.011(12)(A)-(B) of the Act. *See Seabright Ins. Co.*, 465 S.W.3d at 643-45.

The nature of the Company's business calls for employing non-local work crews to travel to distant job sites on temporary assignments. *See id.* at 643-44. Martinez's employment required him to travel with Baltasar, Longoria, and Rendon to distant job sites and to arrive at those sites at the same time. *See id*. at 644. In addition, to accommodate the required travel, the Company furnished the foreman with a company vehicle and a company credit card to pay for fuel. *See id.* Martinez was driving the company vehicle at the foreman's direction. *See Aguirre*, 225 S.W.3d at 751-52 (noting employee was in course and scope of employment when driving company vehicle at direction of his foreman). Because Martinez's travel to the job site and the risks associated with that travel were dictated by the Company's business model, the very nature of the work performed by Martinez required his travel to the job site. *See SeaBright Ins. Co.*, 465 S.W.3d at 644. Based on the summary judgment evidence, the relationship between Martinez's travel and his employment is such that Martinez established the origination element. *See id*.

It is undisputed that Baltasar died in an accident while Martinez was driving to the job site. Martinez's travel to the job site furthered the Company's business; therefore, we hold Martinez conclusively established the furtherance element. *See id*. at 644-45.

Finally, at the time of the accident, Martinez was traveling only to his place of employment and not to any of his personal or private affairs. *Id*. Martinez's travel thus implicates the "coming and going" exclusion set forth in section 401.011(12)(A). *See id*. at 645; *see also* TEX. LABOR CODE § 401.011(12)(A). The summary judgment evidence, however, establishes that the Company provided the foreman with the vehicle the crew used to travel and paid for the vehicle's fuel; therefore, Martinez conclusively established the exception to the exclusion applicable when the transportation is paid for by the employer. *SeaBright Ins. Co.*, 465 S.W.3d at 645; *see also* TEX. LABOR CODE § 401.011(12)(A)(i).

Selena points out minor differences between the facts in *SeaBright Ins. Co*. and the facts in the instant case; however, based on the summary judgment evidence and the applicable standard of appellate review, those factual differences do not yield a different result. Instead, we hold Martinez conclusively established he was within the course and scope of his employment at the time of the collision that resulted in Baltasar's death.

CONCLUSION

Because Martinez conclusively established he was within the course and scope of his employment at the time of the collision, he established as a matter of law that he was an employee of the Company for purposes of the exclusive remedy defense.[2] Accordingly, the trial court properly granted summary judgment in Martinez's favor, and the trial court's judgment is affirmed.

Patricia O. Alvarez, Justice

[2] Because we hold Martinez conclusively established the Act's exclusive remedy defense, we need not consider whether Martinez also conclusively established his election of remedies defense. *See Payne v. Galen Hosp. Corp*., 28 S.W.3d 15, 17 (Tex. 2002) ("Because we hold that workers' compensation benefits are Payne's only remedy against the hospital for her Toradol reaction, we need not consider whether the election-of-remedies doctrine bars her common-law claims."); *but see Wright*, 1998 WL 577549, at *1 (asserting court was not required to consider both exclusive remedy provision and election of remedies doctrine as two distinct grounds for summary judgment because the exclusive remedy provision is essentially a codification of the election of remedies doctrine).