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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

WILLIAM CUNNINGHAM et al., Plaintiffs and Appellants, v. PATRICK PAUL et al., Defendants and Respondents.	B284115 (Los Angeles County Super. Ct. No. BC534852)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert B. Broadbelt III, Judge. Affirmed.

Jerold D. Sullivan and David J. Ebenhack, for Plaintiffs and Appellants.

Gordon Rees Scully Mansukhani, LLP and Don Willenburg; Law Offices of John A. Hauser and Scott S. Blackstone, for Defendant and Respondent Project Rover, Inc.

Plaintiffs William Cunningham and Sharon Vidal Cunningham (Cunninghams or appellants) appeal from a summary judgment granted in favor of defendant Project Rover, Inc. dba Gravity (Gravity or respondent). We conclude the trial court properly granted summary judgment on the ground the undisputed facts demonstrate respondent cannot be held vicariously liable for the motor vehicle accident caused by its employee Patrick Paul (Paul) because he had substantially departed from the employer's business and was engaged in a purely personal activity at the time of the accident. Accordingly, we affirm.

FACTUAL BACKGROUND

Respondent company provides internet-related services and hired Paul in 2010 to provide computer technical services. Paul ordinarily worked in the Santa Monica office, but in 2012 he also would work at the data center in downtown Los Angeles approximately twice a month, or perhaps as much as once or twice a week. Paul lived downtown on Santee Street.

There was no written requirement in his job description that he have a vehicle to perform his job. Gravity did not pay Paul for mileage or gas for the use of his vehicle, nor did he submit mileage to respondent for reimbursement. He was never told he would be compensated for the use of his vehicle and he did not expect to be compensated for his mileage.

On the evening of Friday, March 16, 2012, Paul experienced a mental delusion which caused him to create a mess at the Santa Monica office by moving some furniture around. He returned to the office the next afternoon to repair the mess he had created the evening before. No one at Gravity was aware that Paul had these delusions or had created the mess at the

office until after the accident which occurred later that Saturday afternoon.

Paul brought his girlfriend and his dog with him to the office that Saturday. Gravity was not aware Paul was in the office and he had no communications with anyone from work that day until after the accident. Paul testified he installed some updates to an application on the computers while he was there cleaning up the mess.

Paul and his girlfriend and dog left the office somewhere between 20 and 45 minutes after they got there. Paul initially intended to drive east from the office in Santa Monica to his home downtown. However, he began to suffer from a delusion that he was being tracked, so he drove to a Red Cross office to seek help. No one there was able to help him. Upon departing there, he left his laptop, computer bag and phone in the Red Cross parking lot because he thought he was being tracked through those devices.

After leaving the Red Cross, Paul made his girlfriend get out of the car because he believed that she was involved in tracking him. He then drove to an Audi dealership, where he asked for directions to the Santa Monica Hospital where he could get treatment for his mental breakdown. He left his dog at the dealership and drove to Santa Monica Hospital, but when he did not get immediate help there, he became "spooked" and left.

He drove west from the hospital because his delusion caused him to believe he needed to go to the ocean. Paul entered the intersection at 11th and Broadway in Santa Monica on a red light. He saw the light was red but he needed to get to the water and he thought in his delusional state that it would be fine to enter the intersection. In doing so, he hit the Cunningham's

vehicle which had entered the intersection on the green light. He told the police officer who investigated the accident that he was having a Christ complex, was in the midst of a nervous breakdown and was racing to the ocean.

Gravity terminated Paul's employment on the day it first learned of the accident. Paul had never had a mental delusion prior to March 11, 2012, and Gravity had no knowledge of Paul's mental delusions at any time prior to the accident.

PROCEDURAL BACKGROUND

The Cunninghams sued Paul and later added Gravity to the suit as Doe 2. Gravity filed a motion for summary judgment raising one issue, as follows: "Defendant Project Rover Inc. dba Gravity's affirmative defense that defendant Patrick Paul was not acting in the course and scope of his employment for Project Rover Inc. dba Gravity at the time of the accident giving rise to this lawsuit bars plaintiffs' lawsuit against defendant Project Rover Inc. dba Gravity as a matter of law." Specifically, Gravity argued Paul was not working that Saturday, the "going and coming" rule protected Gravity from liability for torts committed by Paul during his commute to and from work if he was working, and that if some exception to the going and coming rule applied, it was still not liable because Paul was acting outside the scope of his employment by substantially deviating from any activity related to his work with Gravity at the time of the accident.

The Cunninghams opposed the motion, contending Paul was in the course and scope of his employment by virtue of the "required vehicle" exception to the going and coming rule. They argued that because Paul was on call 24 hours a day, occasionally travelled from Gravity's office in Santa Monica to the data center downtown, and sometimes took calls from the office while in his

car, that his vehicle and his phone and laptop in it impliedly made his vehicle a requirement of his job and that his "mental delusion induced route was only a slight deviation from Paul's regular path home."

The trial court found there were material issues of fact as to whether Paul was working on March 17, 2012, and whether Paul was implicitly required to drive his personal vehicle as a condition of employment. But it found, "as a matter of law, that Paul substantially deviated from the scope of his employment (including his commute home) such that defendant cannot be held liable to plaintiffs for their injuries under the doctrine of respondeat superior. Even assuming Paul was working on March 17, 2012, and even assuming the going and coming exception did not apply by virtue of the required-vehicle exception, Paul's acts were of a sufficiently personal and unforeseeable nature as to protect defendant from any vicarious liability to plaintiffs under the doctrine of respondeat superior."

This appeal followed.

DISCUSSION

Standard of Review

Summary judgment is appropriate where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) A moving defendant must show that one or more elements of the cause of action cannot be established, or that there is a complete defense to the cause of action. Once defendant meets that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

"A grant of summary judgment is reviewed de novo." (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 93 (*Halliburton*).)

Respondeat Superior Liability

"Under the doctrine of respondeat superior, an employer may be held vicariously liable for torts committed by an employee within the scope of employment." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208.) "The burden of proof is on the plaintiff to demonstrate that the negligent act was committed within the scope of employment. [Citations.]" (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 721-722.) "Where the facts of the case make it arguable whether the employee has acted within the scope of his employment, then the scope of employment issue is one properly decided by the trier of fact. However, where the facts would not support an inference that the employee acted within the scope of his employment and where there is no dispute over the relevant facts, the question becomes one of law." (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 138 (*Alma W*).)

An employer is vicariously liable for the risks that may fairly be regarded as typical of or broadly incidental to the enterprise of the employer; that is, the risks inherent in or created by the enterprise. (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 960 (*Hinman*).) Vicarious liability is placed upon the employer not because it is at fault, but because ""'[t]he losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business.'"" (*Halliburton, supra,* 220 Cal.App.4th at p. 94, quoting *Hinman,* at pp. 959-960.) The tort must be

foreseeable from the employee's duties, or in other words, the employment must be such as predictably to create the risk employees will commit torts of the type for which liability is sought. (*Vogt v. Herron Const., Inc.* (2011) 200 Cal.App.4th 643, 649.)

Under the "going and coming" rule, an employer ordinarily is not liable for an employee's torts while the employee is going to or from work because the commute is considered to be outside the scope of employment. (*Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803, 807; *Jeewarat v. Warner Bros. Entertainment Inc.* (2009) 177 Cal.App.4th 427, 435.)

However, if the employee's trip to or from work involves an incidental benefit to the employer not common to the commute made by ordinary members of the workforce, the going and coming rule will not apply. (*Hinman, supra,* 2 Cal.3d at p. 962.) This "incidental benefit" exception, sometimes also called the "required vehicle" exception, applies "if the use of a personally owned vehicle is either an express or implied condition of employment (*Hinojosa v. Workmen's Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 152), or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has 'reasonably come to rely upon its use and [to] expect the employee to make the vehicle available on a regular basis, while still not requiring it as a condition of employment.' (*County of Tulare v. Worker's Comp. Appeals Bd.* (1985) 170 Cal.App.3d 1247, 1253.)" (*Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301, fn. omitted.) If the vehicle is required, the employer is liable for any negligence which occurs while the employee is traveling to or from work in that vehicle. (*Henderson*

v. Adia Services, Inc. (1986) 182 Cal.App.3d 1069, 1073-1074; *Tryer v. Ojai Valley School* (1992) 9 Cal.App.4th 1476, 1481.)

In opposing Gravity's motion for summary judgment, the Cunninghams raised a triable issue of fact as to whether Paul was working that Saturday with evidence he installed a program while there. They also raised an issue of fact concerning the application of the required vehicle exception to the going and coming rule by arguing that Gravity benefited from Paul's use of his own vehicle because he was on call 24 hours a day, occasionally travelled from Gravity's office in Santa Monica to the data center in downtown Los Angeles, sometimes took calls from the office while in his car, and transported his phone and laptop in it. However, even if the "incidental benefit" or "required vehicle" exception applies here, Gravity presented undisputed facts establishing that Paul was engaged in purely personal business at the time of the accident and was not acting within the scope of his employment for purposes of respondeat superior liability.

"Where the incidental benefit exception applies, the employee's commute directly between work and home is considered to be within the scope of employment for respondeat superior purposes. Minor deviations from a direct commute are also included, but there is no respondeat superior liability if the employee substantially departs from the employer's business or is engaged in a purely personal activity at the time of the tortious injury." (*Halliburton*, *supra*, 220 Cal.App.4th at pp. 97, 102.)

Whether a deviation from the employer's business is substantial or not is generally a question of fact, but it may be decided as a matter of law where there is "'"clear, positive and uncontradicted evidence which is not open to doubt." [Citation.]'"

(*Halliburton, supra*, 220 Cal.App.4th at p. 105; see generally, *Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1607-1608 (*Le Elder*) [scope of employment is a question of fact which becomes a question of law when the facts are undisputed and no conflicting inferences are possible].) Stops to make personal purchases (*Lazar v. Thermal Equipment Corp.* (1983) 148 Cal.App.3d 458), to purchase groceries (*State Farm Mut. Auto Ins. Co. v. Haight* (1988) 205 Cal.App.3d 223) and to attend a yoga class (*Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886) have been determined to be minor deviations it is foreseeable people will make on their way home from work. On the other hand, driving children to school before returning home to work from home (*Le Elder*), visiting family and stopping for fast food (*Sunderland v. Lockheed Martin Aeronautical Systems Support Co.* (2005) 130 Cal.App.4th 1) and driving a company car to an auto dealership to purchase a vehicle for a family member (*Halliburton*) were all found to be, as a matter of law, substantial departures from the commute.

Here, the trial court found "as a matter of law, that Paul substantially deviated from the scope of his employment (including his commute home) such that defendant cannot be held liable to plaintiffs for their injuries under the doctrine of respondeat superior. Even assuming Paul was working on March 17, 2012, and even assuming the going and coming exception did not apply by virtue of the required-vehicle exception, Paul's acts were of a sufficiently personal nature as to protect defendant from any vicarious liability to plaintiffs under the doctrine of respondeat superior."

The undisputed facts compel the conclusion, as a matter of law, that Paul had substantially deviated from his commute

home at the time of the accident. Paul was headed home until he experienced a delusion and changed destinations from home to some place where he could get help for his condition. He made three stops, at the Red Cross, an Audi dealership and a hospital in an attempt to obtain some sort of medical or psychiatric care, each time traveling further and further away from his home. He was on his way to the beach, not his home, when the accident occurred. His actions after he left the office were personal, not foreseeable from his duties and constituted a substantial departure from his commute home as a matter of law.

Appellants also argue that the "emergency" rule in worker's compensation cases should be adopted here in furtherance of the basic policy of risk allocation which underlies respondeat superior liability. They contend that "actions taken in response to unexpected and unanticipated emergencies, such as those experienced by Defendant Paul, are in the course of employment, even if the emergency is only in the actor's imagination, if he acted in good faith." Citing only two treatises on worker's compensation, they do not offer any case law extending the emergency doctrine beyond worker's compensation matters involving compensation to the employee for injuries he or she suffered at work due to an emergency. Paul is not seeking compensation for his injuries at work. The Cunninghams are seeking to hold his employer liable for their injuries, caused by Paul when he had substantially deviated from the scope of his employment. It would not serve any recognized policy to make his employer liable in those circumstances. The claim that "'the scope of an employee's employment is impliedly extended in an emergency to include the performance of any act designed to save life or property in which the employer has an interest,'" is

inapplicable. There is no evidence there was a danger of any loss of life or a loss of any property in which Gravity had an interest that Saturday afternoon. The court declines to extend the worker's compensation emergency doctrine to this matter.

DISPOSITION

The summary judgment is affirmed. Respondent, Project Rover, Inc., is entitled to costs on appeal.

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_____, J.*
MATZ

We concur:

_____, P.J.
LUI

_____, J.
HOFFSTADT

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.