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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TONY MORENO, Plaintiff and Appellant, v. TWIN TOWN CORPORATION, Defendant and Respondent.	B277201 (Los Angeles County Super. Ct. No. BC564396)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Sotelo, Judge. Reversed with directions.

Kabateck Brown Kellner, Brian S. Kabateck and Cheryl A. Kenner, Shea S. Murphy, and Joseph S. Persoff, for Plaintiff and Appellant.

Banashek Irving, Michael W. Irving and Matthew Banashek, for Defendant and Respondent.

INTRODUCTION

The highly publicized tragedy that led to this lawsuit occurred on November 24, 2012, when Sherri Wilkins, intoxicated and driving her own car, struck pedestrian Phillip Moreno. The impact propelled the victim, feet first, partially through the windshield of her car. He remained embedded there as Wilkins drove two more miles before witnesses forced her to stop. Plaintiff, the victim's father, sued defendant Twin Town Corporation, Wilkins's employer, for wrongful death, alleging both vicarious and direct liability. The trial court granted defendant's motion for summary judgment. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Wilkins, a recovering alcoholic and addict, was employed by defendant as an alcohol and substance abuse counselor. Her regular work schedule was Monday through Friday, from approximately 2:00 p.m. to 10:30 p.m. She did not "punch a clock" and occasionally varied her hours or came into work on Saturdays. Defendant provided Wilkins with a key to the offices.

Defendant required Wilkins to drive her own car to work so she would be able to travel to another Twin Town facility or fulfill "any other work related assignment." On those occasions when she drove her car for work assignments, defendant reimbursed Wilkins's mileage.

Maintaining sobriety was a condition of Wilkins's employment with defendant. She relapsed in October 2012, but did not tell defendant she was drinking again. She drank "whenever [she] was in pain, too much pain to function . . . . [¶] I just did little baby shots . . . . I was self medicating myself." If

defendant learned of her relapse, Wilkins would have been fired and not eligible for rehire until she achieved 12 months of sobriety.

Wilkins went into work Saturday evening, November 24, 2012, because the computers were down the day before and she needed to catch up on her work. Wilkins's supervisor did not ask her to work that evening, and Wilkins had not been pre-approved for any overtime.

Earlier that day Wilkins had taken prescription pain medication and her daily methadone dose. She spent a few hours in the office and finished around 11:00 p.m. She went to her car, drank several shots of vodka and a beer/tomato juice beverage, smoked a cigarette, and then began what should have been a 10-minute drive home. Wilkins struck the victim minutes later. She was criminally prosecuted and convicted in the victim's death.

Plaintiff sued defendant for the wrongful death of his son. Defendant moved for summary judgment, contending it owed plaintiff's decedent no duty and could not, as a matter of law, be vicariously liable to plaintiff under a respondeat superior theory or primarily liable for its own negligence (negligent hiring, supervision or training). Plaintiff opposed the motion on procedural and substantive grounds. The trial court conducted two hearings and obtained supplemental briefing from the parties before granting defendant's motion. Judgment was entered July 14, 2016. Plaintiff timely appealed.

DISCUSSION

In this case, defendant only sought summary judgment and did not alternatively move for summary adjudication of issues.[1] (Code Civ. Proc., § 437c.) We review a summary judgment de novo and accord no deference to the trial court's reasoning or decision. (*Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336.)

On appeal, defendant makes a series of concessions that dramatically narrow the scope of our de novo review. Defendant "concede[s] [for the purposes of this appeal] that there are triable issues on (1) the basic existence of an 'incidental benefit' or 'required vehicle' exception during Wilkins's regular work week . . . ." Defendant accordingly suggests this court "faces a pure (and possibly dispositive) question of law: Does the required vehicle exception only apply to an employee's regular commute? Or does it also apply when an employee goes to the workplace when not needed or requested, does no useful work, and then proceeds to injure or kill someone on her drive home?"

To address these questions, we begin with California's "going and coming" rule. It is not statutory. It was judicially created in the context of workers' compensation proceedings (*Hinojosa v. Workmen's Comp. Appeals Bd.* (1972) 8 Cal.3d 150), but has been applied for generations to limit an employer's liability for an employee's tortious acts during the commute to

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[1] The procedural deficiencies plaintiff notes potentially would have had a greater impact if defendant also sought summary adjudication of issues. The trial court had discretion to decide the motion on the merits despite the irregularities (Code Civ. Proc., § 437c, subd. (b)(1)), and we find it did not abuse that discretion in doing so.

and from work. (*Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803 (*Huntsinger*). The going and coming rule precluding respondeat superior liability is subject to several exceptions, including the "required vehicle" exception.

Lobo v. Tamco (2010) 182 Cal.App.4th 297 (*Lobo*) explains: "Under the theory of respondeat superior, employers are vicariously liable for tortious acts committed by employees during the course and scope of their employment. [Citation.] However, under the 'going and coming' rule, employers are generally exempt from liability for tortious acts committed by employees while on their way to and from work because employees are said to be outside of the course and scope of employment during their daily commute. (*Huntsinger*[, *supra,* 22 Cal.App.3d at p. 807].) [¶] 'A well-known exception to the going-and-coming rule arises *where the use of the car gives some incidental benefit to the employer*. Thus, the key inquiry is whether there is an incidental benefit derived by the employer. . . .' This exception to the going and coming rule, carved out by this court in *Huntsinger, supra,* 22 Cal.App.3d 803 . . . , has been referred to as the 'required-vehicle' exception. [Citation.] The exception can apply if the use of a personally owned vehicle is either an express or implied condition of employment . . . ." (*Lobo, supra,* 182 Cal.App.4th at p. 301.)

The negligent driver in *Lobo* was a 16-year employee of the defendant. His employer required him to drive to work in case he needed to respond to a quality control issue at a customer's location. During the employee's entire tenure with the defendant, he had used his own car for this purpose fewer than 10 times. (*Lobo, supra,* 182 Cal.App.4th at p. 302.) On the day of the accident, the employee was leaving his employer's offices to

drive home. It was a regular work day, and the employee had not needed his car to visit a customer site. As he entered the highway from the defendant's premises, he collided with a police motorcycle, killing the officer. (*Id.* at p. 299.)

The trial court granted the defendant's motion for summary adjudication of issues on the respondeat superior cause of action. On appeal, the defendant asserted the required-vehicle exception to the going and coming rule should only be applied where driving is "'integral'" to the employee's job and an employee's "occasional use of his own car [for company purposes] is insufficient as a matter of law to invoke the exception." (*Lobo, supra,* 182 Cal.App.4th at p. 303.) The Court of Appeal rejected this position and held the applicability of the required-vehicle exception presents a material issue of fact, i.e., whether the employee was in the course and scope his employment, that defeats summary judgment even where "the employer only rarely makes use of the employee's personal vehicle." (*Ibid.*)

Defendant acknowledges *Lobo* and even concedes that if Wilkins struck the victim on her way home from a regular workday, material questions as to whether she was acting within the course and scope of her employment or providing incidental benefits to her employer would have precluded summary judgment. But defendant asserts *Lobo* should not apply here: "[O]n a Saturday night when no one requested [Wilkins] to go in, there is *zero* chance she would have been requested to make a client visit, or to run some other errand for her employer. The underlying rationale of the required vehicle exception simply does not apply."

Rather, defendant urges this court to adopt the holding in *Carter v. Reynolds* (2003) 175 N.J. 402 (*Carter*). There, the New

Jersey Supreme Court concluded, "In every case in which a plaintiff invokes the required-vehicle exception to the going and coming rule, he or she must establish that the employer, in fact, required the vehicle to be provided by the employee on the day in question." (*Id.* at p. 417.) In reaching its decision, the *Carter* court expressly declined to consider or adopt what it termed "the broad enterprise liability theory that is the standard for *respondeat superior* in California." (*Id.* at p. 418.) The New Jersey Supreme Court explained, "The California formulation states that the "'modern and proper basis of vicarious liability of the master is not his control or fault but the risks incident to his enterprise.'" *Huntsinger, supra,* [22 Cal.App.3d at p. 808] (quoting *Hinman*[*v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 960.]) In other words, "'[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.'"" (*Carter, supra,* 175 N.J. at p. 419.)

Contrary to the New Jersey rule, California's application of the required vehicle exception has not been conditioned on the employer's demand that the employee's car be available on the day in question. Although defendant has framed its position in terms of an additional condition, the argument really is that no jury or other trier of fact could ever resolve the disputed issues in plaintiff's favor, so the trial court and this court should rule in defendant's favor as a matter of law. It is not our function to weigh the merits of the case or resolve triable issues of material

fact, however. If a triable issue of material facts exists, summary judgment is precluded.[2]

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[2] Because defendant did not seek summary adjudication of issues, we do not reach the issues concerning whether defendant may be primarily liable to plaintiff based on theories of negligent hiring, supervision or training.

Defendant also seeks to cast the issue here as falling under the "special errand" exception to the going and coming rule. This is a separate doctrine. As *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 899 (*Moradi*) explains, the special errand doctrine may apply in circumstances that "'do not involve local commutes en route to fixed places of business at fixed hours. These are the extraordinary transits that vary from the norm because the employer requires a special, different transit, means of transit, or *use of a car,* for some particular reason of his own. When the employer gains that kind of a particular advantage, the job does more than call for routine transport to it; it plays a different role, bestowing a special benefit upon the employer by reason of the extraordinary circumstances. The employer's special request, his imposition of an unusual condition, removes the transit from the employee's choice or convenience and places it within the ambit of the employer's choice or convenience, restoring the employer-employee relationship.'" *Moradi* added, the special errand exception "is *different from and more narrow than* the required vehicle exception." (*Id.* at p. 906, italics in original.) No evidence before the trial clout supported the application of the special errand doctrine. For this reason, *Morales-Simental v. Genentech, Inc.* (2017) 16 Cal.App.5th 445, which involved the special errand, but not the required vehicle, exception is similarly inapposite.

DISPOSITION

The judgment in defendant's favor is reversed and the matter is remanded to the trial court with directions to vacate the order granting summary judgment and enter an order denying the motion. Plaintiff is awarded costs on appeal.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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