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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

FELIPA BLAS, Plaintiff and Appellant, v. BERA L. PORTUGAL, Defendant, LINK GROUP, INC. Defendant and Respondent.	B278229 (Los Angeles County Super. Ct. No. BC542338)

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

Derek L. Tabone for Plaintiff and Appellant.

Biesty, Garretty & Wagner, Sean P. Garretty and James Thomas Biesty, for Defendant and Respondent Link Group, Inc.

Plaintiff Felipa Blas sought damages individually and as conservator for her husband, Roberto Blas Jimenez, for injuries Jimenez sustained after his bicycle collided with the door of a car driven by defendant Bera Portugal. Blas also sought damages from Portugal's employer, defendant and respondent Link Group, Inc., dba Allie's Bridal ("Link Group"), under a theory of respondeat superior. Link Group moved for summary judgment, relying in part on Blas's concession that Portugal, who was off work on the day of the incident, "did not work for, or conduct any business for," Link Group that day. The trial court granted the motion, and Blas appeals.

We affirm. The undisputed facts demonstrate as a matter of law that Portugal was not acting within the course or scope of her employment at the time of the incident. Blas has not pointed to any evidence supporting her contention that Link Group nevertheless should be liable for the incident because it benefited from Portugal's personal interaction with a company vendor on her day off work.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2014, Blas filed a complaint against Portugal and Link Group. She alleged that, on February 22, 2013, Jimenez was riding his bicycle on Whittier Boulevard when Portugal opened the driver's side door of her car, which was parked on the street. Jimenez was unable to avoid striking the door. The impact of the collision knocked him off his bicycle and into the path of another vehicle. The other vehicle struck Jimenez. He sustained catastrophic spinal cord and head trauma that left him physically and mentally impaired and "essentially confined to bed in a care facility." Blas, acting as Jimenez's conservator as well as in her own behalf, asserted causes of action for personal

injury, property damage, general negligence, and loss of consortium against Portugal and her employer, Link Group, the latter under a theory of respondeat superior.

Link Group moved for summary judgment in September 2015, on the ground that Portugal was not acting within the course and scope of her employment when the incident occurred. The undisputed material facts set forth in the parties' separate statements pertinent to this issue are as follows.

Portugal began working for Link Group in 2008 and was an employee on the date of the incident, February 22, 2013. She managed a Link Group-owned bridal store, Allie's Bridal, in Norwalk. Portugal's regular work hours at Allie's Bridal were 11:00 a.m. to 7:00 p.m. Monday through Friday and 10:00 a.m. to 4:00 p.m. on Saturday. Her job duties included leaving the store once per week to pick up merchandise. Portugal used her own vehicle, a Toyota registered in her name, for those trips. Neither Link Group nor Allie's Bridal had any ownership interest in Portugal's Toyota or paid for her auto insurance.

Portugal asked her supervisor for personal time off work from February 22, 2013 to February 24, 2013 so she could attend a bachelorette party and wedding in San Diego. The supervisor approved Portugal's request for time off. Portugal arranged for another employee, Crystal Delgadillo, to work at the store by herself during Portugal's time off. Delgadillo stated in a declaration that she was the only person who worked at Allie's Bridal on Friday, February 22, 2013. Both she and Portugal testified that Portugal never went to the store on February 22, 2013. Blas did not dispute Link Group's assertion that, "On February 22, 2013, Portugal did not work for, or conduct any business for, Allie's Bridal."

Instead, on February 22, 2013, at or about 10:00 a.m., outside her normal work hours, Portugal drove her Toyota to A. Torres Tuxedo Warehouse ("Torres Tuxedo") in East Los Angeles to pick up a tuxedo for her husband to wear to the wedding they were attending. Portugal paid for the tuxedo rental with her own money in cash. Torres Tuxedo issued Portugal an invoice for the tuxedo, reflecting that Portugal paid in cash. Allie's Bridal has a policy of paying Torres Tuxedo by check only. Neither Link Group nor Allie's Bridal issued a check for any merchandise from Torres Tuxedo on February 22, 2013.

Portugal was parked outside Torres Tuxedo when Jimenez collided with her driver's side door. After the incident, Portugal dropped off the tuxedo at her house and traveled to San Diego for the bachelorette party. She stayed in San Diego until Sunday, February 24, 2013, and returned to work at Allie's Bridal on Monday, February 25, 2013.

The trial court granted Link Group's motion for summary judgment. Based on the undisputed facts related above, it concluded that Link Group "has met its burden that there is no triable issue of material fact that that [*sic*] defendant Portugal was not acting within the course and scope of her employment." The court then found that Blas did not meet her burden of demonstrating a triable issue of material fact. The court rejected Blas's argument that Portugal was working at the time because she was paid, it was her normal workday, and she was visiting a vendor with whom Allie's Bridal does business. As it explained, the case "does not involve Bera Portugal's commute to and from work and it is undisputed that on February 22, 2013, Portugal had a paid day off from work and was engaged in a personal errand." The court further noted that it "can find no decision that

has applied the 'required-vehicle' exception to the 'coming and going' rule to an employee's travel on a day she was given paid leave from . . . work and was involved in a totally personal activity with a company that her employee [*sic*] sometimes did business with." The court accordingly granted Link Group's motion for summary judgment.

Blas timely appealed.

STANDARD OF REVIEW

A trial court properly grants a motion for summary judgment where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) ""We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained."' [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) Like the trial court, we employ a three-step analysis: "'First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue. [Citation.]' [Citation.]" (*Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 71.)

DISCUSSION

Blas contends summary judgment was erroneously granted because she carried her burden of demonstrating a triable issue

of material fact as to whether Portugal was acting within the scope of her employment under the "combined purposes" exception to the "going and coming" rule. Specifically, she claims the evidence showed Portugal conducted "networking" at Torres Tuxedo, such that "a jury could easily find that Ms. Portugal's drive to the A[.] Torres Tuxedo shop provided a benefit to her employer." We disagree.

Under the doctrine of respondeat superior, an employer is vicariously liable for torts its employees commit within the scope of their employment. (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 93-94 (*Halliburton*); see also Civil Code, § 2338.) The doctrine rests on a policy determination that "it is considered fair to allocate to the costs of doing business a loss resulting from a risk that arises in the context of the employment enterprise." (*Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 160.) A plaintiff seeking to impose liability on an employer under respondeat superior thus must prove that the employee was acting within the scope of his or her employment at the time of the alleged tortious conduct. (*Halliburton*, *supra*, 220 Cal.App.4th at p. 94.) That is, the plaintiff must prove there is a "'nexus between the employee's tort and the employment to ensure that liability is properly placed upon the employer.' [Citation.]" (*Id.* at p. 95.)

"The most common, obvious cases in which respondeat superior liability arises are those 'in which the employee commits a tortious act while performing his or her ordinary duties for the employer at the employer's place of business. In such circumstances, the employer is ordinarily liable for the employee's tortious act, even if wholly unauthorized and without benefit to the employer.' [Citation.]" (*Halliburton*, *supra*, 220

Cal.App.4th at p. 95.) Other situations, such as the one here, are governed by a series of rules and exceptions.

For instance, the "going and coming rule" holds that an employee does not act within the scope of his or her employment while traveling to or from the workplace. (*Baptist v. Robinson*, *supra*, 143 Cal.App.4th at p. 162.) This rule rests on the commonsense notion that "the employment relationship is suspended from the time the employee leaves work until he or she returns." (*Ibid.*) "An exception to this rule is where the employee is engaged in a 'special errand' or 'special mission' for the employer" outside of work. (*Ibid.*) A related exception is the "combined purposes rule," relied on by Blas here, which provides "that where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master." (*Ryan v. Farrell* (1929) 208 Cal. 200, 204 (*Ryan*); see also *Farmers Insurance Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004.) Under these rules and exceptions, "it is necessary to determine the main purpose of the injury-producing activity: If it was the pursuit of the employee's personal ends, the employer is not liable." (*Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1607.)

"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.) The question is one of law here.

Despite emphasizing on appeal that Portugal's job duties included visiting vendors, and that she was paid on the day of the incident, Blas did not dispute below that Portugal "did not work for, or conduct any business for, Allie's Bridal" on the day of the incident. This factual concession renders the "most common, obvious" respondeat superior situation inapplicable. Likewise, the undisputed evidence that Portugal did not spend any time at Allie's Bridal on the day of the incident forecloses application of the "special errand" exception to the going and coming rule.[1] With these avenues foreclosed, Blas contends that the combined purposes rule applies, because Link Group "derived sufficient benefit from" Portugal's trip to Torres Tuxedo on her paid day off

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[1] The fact that Portugal was neither going to nor coming from work also forecloses another exception to the going and coming rule, the "required-vehicle exception." That exception arises "'where the use of the car gives some incidental benefit to the employer'" and "can apply if the use of a personally owned vehicle is either an express or implied condition of employment [citation], 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.' [Citation.]" (*Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301.) Blas provides no support for her suggestion that the use of the phrase "incidental benefit" in the context of this exception means that an employer may be held liable where personal conduct by an off-duty employee neither going to nor coming from work might be thought to afford some "incidental benefit" to the employer.

to require Link Group "to bear the risk of that negligence as a cost of doing business." She asserts that Portugal "seemed to benefit from the business relationship between Allie's and A Torres [*sic*]" inasmuch as the invoice reflects only a $10 payment, and asks, "Is it not also reasonable to infer that Allies [*sic*] received some benefit by having its manager not only use the services of A Torres [*sic*], but go there personally to pick up the tuxedo? One would expect there to be some exchange between Ms. Portugal and the staff of the tuxedo shop, what is often called 'networking[,]' to strengthen the relationship to the mutual benefit of both businesses, including Allie's."

There are two problems with this argument. First, there is no evidence to support Blas's assertion that "networking" occurred during Portugal's visit to Torres Tuxedo on the day of the incident. There is no evidence that Blas asked Portugal about any conversations she had with the employees at Torres Tuxedo during Portugal's deposition, or obtained similar information from the employees on duty at Torres Tuxedo at the time. Similarly, there is no evidence showing how the $10 tuxedo charge compared to Torres's normal tuxedo rental rates or conferred a benefit on Link Group. Although Blas asserts that it is reasonable to "expect" networking when an off-duty bridal shop employee conducts personal business with a bridal shop vendor, a party "cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact." (*LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 Cal.App.4th 977, 981.) Blas did not raise a triable issue of fact on this issue.

Even if she had, the second problem is that we look to the main purpose of the employee's injury-producing activity; if that

main purpose was "the pursuit of the employee's personal ends, the employer is not liable." (*Le Elder v. Rice*, *supra*, 21 Cal.App.4th at p. 1607.) There is no dispute that Portugal's main purpose in visiting Torres Tuxedo on February 22, 2013, a day she was off work, was to pick up a tuxedo for her husband to wear to an upcoming wedding unrelated to the workplace. That is a personal purpose that had nothing to do with her work at Allie's Bridal. Thus, even if Link Group derived some benefit from Portugal's interaction with its vendor—a proposition for which there was no evidence—such benefit alone does not overcome Link Group's undisputed evidence that the main purpose of Portugal's errand was personal.

Blas contends that *Ryan*, *supra*, 208 Cal. at p. 204, solves this second problem, because the Supreme Court there stated that the combined purposes rule applies "unless it clearly appears that the servant could not have been directly or indirectly serving his master." In her view, the mere possibility that Portugal's interaction with Torres Tuxedo could have benefited Allie's Bridal (and therefore Link Group) precluded the entry of summary judgment in Link Group's favor. That is, she contends, "[t]o prevail on summary judgment Respondent must present evidence which establishes that Ms. Portugal's trip to A. Torres could not have provided any incidental benefit to her employer." *Ryan*, which involved a car salesman who injured a third party while driving back to San Diego from Pacific Beach, "where he had gone with the purpose of interviewing a prospective purchaser," does not bear this weight. (*Ryan*, *supra*, 200 Cal. at p. 202.) The undisputed evidence showed that Portugal did not patronize Torres Tuxedo at the direction of her employer or on her way to or from work, and there was no

evidence she had anything but a single, personal purpose in doing so. Link Group did not have to prove a negative to obtain summary judgment. Instead, to survive summary judgment, Blas had to come forward with evidence from which a jury could infer that Portugal was acting within the scope of her employment at the time of the tragic incident. She did not, and the court appropriately granted summary judgment to Link Group.

DISPOSITION

The judgment of the trial court is affirmed. Respondent Link Group shall recover its costs on appeal.

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COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.