SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3134-16T1

RONALD HARRIS and
PATRICIA HARRIS, h/w,

Plaintiffs-Appellants,

v.

BERNARDO CHAVEZ-ECHEVERRY,

Defendant,

and

BOARDWALK ACURA, NJ-HAII, INC., and GROUP 1 AUTOMOTIVE, INC.,

Defendants-Respondents.

Argued October 11, 2017 – Decided October 24, 2017

Before Judges Hoffman, Gilson and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-5071-14.

Richard A. Stoloff argued the cause for appellants.

Gerald T. Ford argued the cause for respondents (Landman Corsi Ballaine & Ford,

PC, attorneys; Mr. Ford, of counsel and on the brief; Fay L. Szakal, on the brief).

PER CURIAM

By leave granted, plaintiffs Ronald and Patricia Harris[1] appeal from a February 17, 2017 Law Division order granting summary judgment in favor of defendants Boardwalk Acura, NJ-HAII, Inc. and Group 1 Automotive, Inc. As genuine issues of material fact exist in the record, we vacate the order granting defendants' motion and remand for further proceedings.

I.

We view the factual record in the light most favorable to plaintiff as the non-moving party. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). This case arises from an accident that occurred on August 23, 2012, when defendant Bernardo Chavez-Echeverry, driving a dealership car, struck plaintiff's motorcycle, causing him to sustain serious bodily injury. At the time, defendants Boardwalk Acura, NJ-HAII, Inc. and Group 1 Automotive, Inc. employed Chavez-Echeverry as a "lot person." His duties included moving cars on the lot, taking out trash, picking up and dropping off clients at their homes, and putting gas in dealership vehicles.

[1] For ease of reference, we refer to Ronald Harris individually as plaintiff.

Chavez-Echeverry testified that on the day of the accident, he requested and received the keys to a dealership car in order to fill it with gas. After he left the dealership, but before he stopped for gas, he decided to go home because he forgot to lock his house door. He did not inform anyone he was going home in the dealership car and he knew it was against company policy to do so. Chavez-Echeverry's home was five minutes from the dealership. The accident occurred on his way home.

Chavez-Echeverry testified he would usually get gas at either the station next to the dealership or the one near his home. Chavez-Echeverry knew he was not permitted to do personal errands while driving dealership cars, but he sometimes did anyway without informing anyone. Chavez-Echeverry testified that when he took a car to get gas he had to request the keys and tell someone why he was taking the car.

Brian Broomell, the general manager of Boardwalk Acura and Chavez-Echeverry's supervisor, said the gas station next to the dealership was the only station authorized for filling vehicles. Broomell also said Chavez-Echeverry could just go get keys to a dealership car without asking permission; in addition, Chavez-Echeverry was the only employee in charge of filling vehicles with gas.

Chavez-Echeverry's driving record as of July 2011 had two unsafe operation convictions, one accident (on the same day as one of the unsafe driving convictions), two unlicensed driver convictions, and one operating while suspended or revoked conviction. However, his license was in good standing on the date of the accident. Between February and April 2012, defendants' human resources (HR) department sent or received seven emails concerning Chavez-Echeverry's job performance, including insubordination problems and possible drinking on the job.

Broomell agreed that employing someone with two unsafe operation convictions, within several months, would give him "cause for concern" and that he "would want to know about it." Broomell further admitted receiving information regarding Chavez-Echeverry's driving before plaintiff's accident, as reflected in this colloquy from his deposition:

> Q: Did anybody ever tell you that they thought he was potentially an unsafe driver?
>
> A: Yes.
>
> Q: Who was that?
>
> A: I don't recall.
>
> Q: Can you tell me when?

A: I think it is in one of the memos.[2]

Q: Okay. Was it before or after the collision we're here for?

A: Before.

Q: Okay. And do you remember who it was that told you that?

A: No.

Q: Do you remember why they said they thought he was an unsafe driver before the collision?

A: Repeat the question.

Q: Could you tell me why they . . . told you they thought he was an unsafe driver before the date of this accident?

A: They thought he was drinking on-the-job at times.

The record does not reflect whether defendants took any steps to investigate the reports of Chavez-Echeverry's on-the-job drinking, even though the HR manager conceded such information "would give [her] concern."

II.

In deciding a summary judgment motion on appeal, we "review the trial court's grant of summary judgment de novo under the same

[2] Broomell sent an email to HR on April 14, 2012, stating, "[Two] people have told me today that Bernardo [Chavez-Echeverry] drinks on the job."

standard as the trial court" and accord "no special deference to the legal determinations of the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). Under this standard, we must grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Ibid. (quoting R. 4:46-2(c)).

"If there is no genuine issue of material fact, we must then 'decide whether the trial court correctly interpreted the law.'" DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008), overruled in part on other grounds by Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558 (2012)). "We review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law." Ibid.

A.

We first address whether Chavez-Echeverry was acting within the scope of his employment at the time of the accident. "Under respondeat superior, an employer can be found liable for the

negligence of an employee causing injuries to third parties, if, at the time of the occurrence, the employee was acting within the scope of his or her employment." Carter v. Reynolds, 175 N.J. 402, 408-09 (2003) (emphasis omitted). "To establish a master's liability for the acts of his servant, a plaintiff must prove (1) that a master-servant relationship existed and (2) that the tortious act of the servant occurred within the scope of that employment." Id. at 409. We consider conduct within the scope of employment when "(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master . . . ." Restatement (Second) of Agency § 228 (1958).

"Generally, an employee who is 'going to' or 'coming from' his or her place of employment is not considered to be acting within the scope of employment." Carter, supra, 175 N.J. at 412. However, there is a "dual purpose" exception covering "cases in which, at the time of the employee's negligence, he or she can be said to be serving an interest of the employer along with a personal interest." Id. at 414. "[W]here the instrumentality being used by the servant is owned by the master, such use raises a rebuttable presumption that the servant was acting within the

scope of employment." Gilborges v. Wallace, 78 N.J. 342, 351-52 (1978).

Here, the parties do not dispute there was an employer-employee relationship between defendants and Chavez-Echeverry satisfying the first requirement of respondeat superior. The parties do dispute whether the tortious conduct of Chavez-Echeverry occurred within the scope of his employment.

Plaintiffs argue Chavez-Echeverry's conduct at the time of the accident falls under the dual purpose exception and was therefore within the scope of his employment, the second requirement of respondeat superior. Chavez-Echeverry was enroute to fill a dealership car with gas when he decided to stop at his house to lock his door. The language of the Restatement supports allowing the dual purpose exception in this case, stating the employee's conduct must be "actuated, at least in part, by a purpose to serve the master . . . ." Restatement (Second) of Agency § 228(c) (1958) (emphasis added).

The parties dispute whether defendants permitted Chavez-Echeverry to get gas at the station near his home. Viewing the facts in the light most favorable to plaintiffs, a reasonable jury could find Chavez-Echeverry had the dual purpose of filling the dealership car with gas and going home to lock his door when the accident occurred. Based on the record before it, the motion

court ignored genuine issues of material fact and mistakenly decided the issue of respondent superior as a matter of law.

B.

We next address whether defendants negligently hired or retained Chavez-Echeverry. The related doctrines of negligent hiring, supervision, and retention are distinct and broader forms of liability than under the doctrine of respondeat superior. Di Cosala v. Kay, 91 N.J. 159, 174 (1982); Lingar v. Live-In Companions, Inc., 300 N.J. Super. 22, 29-30 (App. Div. 1997). Significantly, these theories do not require that an employee's tortious conduct occur within the scope of his or her employment. Johnson v. Usdin Louis Co., 248 N.J. Super. 525, 528 (App. Div.), certif. denied, 126 N.J. 386 (1991). Rather, the basis for liability stems from the principle that "[a]n employer whose employees are brought into contact with members of the public in the course of their employment is responsible for exercising a duty of reasonable care in the selection or retention of its employees." Di Cosala, supra, 91 N.J. at 170-71; Lingar, supra, 300 N.J. Super. at 30.

Under a negligent retention theory,

> the question presented is whether the employer, knowing of its employee's unfitness, incompetence or dangerous attributes when it hired or retained its employee, should have reasonably foreseen the likelihood that the

> employee through his employment would come into contact with members of the public, such as plaintiff, under circumstances that would create a risk of danger to such persons because of the employee's qualities.
>
> [Di Cosala, supra, 91 N.J. at 177.]

There are two general showings that a plaintiff must make to impose liability under these theories. First, the employer must have known or had reason to know "of the employee's dangerous characteristics and the reasonable foreseeability of harm to other persons as a result of these qualities." Ibid.; Johnson, supra, 248 N.J. Super. at 528. Second, a plaintiff must show proximate causation, meaning the injury to the particular plaintiff was foreseeable by the employer. Ibid. A plaintiff will recover only when a duty owed to the injured third-party can be established in law and the breach of said duty can be proven in fact. Johnson, supra, 248 N.J. Super. at 529.

Whether a duty exists is a matter of law, Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 445 (1998), that poses "a question of fairness" involving "a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." Kelly v. Gwinnell, 96 N.J. 538, 544 (1984) (quoting Goldberg v. Hous. Auth. of Newark, 38 N.J. 578, 583 (1962)). In reviewing a trial court's determination that a duty does or does not arise in a particular situation, we

are not bound by the court's interpretation of the law or the court's view of the legal consequences of the alleged facts. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The duty analysis is "rather complex." J.S. v. R.T.H., 155 N.J. 330, 337 (1998). "[I]n its determination whether to impose a duty, [a court] must also consider the scope or boundaries of that duty." Id. at 339. Moreover, the court must recognize "the more fundamental question whether plaintiff's interests are entitled to legal protection against defendant's conduct." Id. at 338 (quoting Weinberg v. Dinger, 106 N.J. 469, 484-85 (1987)). However, underlying factual determinations are necessary to make that assessment, including "the relationships between and among the parties, . . . an assessment of the defendant's 'responsibility for conditions creating the risk of harm,' and an analysis of whether the defendant had sufficient control, opportunity, and ability to have avoided the risk of harm." Id. at 338-39 (quoting Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 574 (1996)).

Here, the question is whether it is fair to impose a duty on defendants to protect third parties such as plaintiff. Defendants' supervising personnel acknowledged the desirability of not allowing employees with unsafe driving records or other problems to drive dealership vehicles on public roads. Defendants provided

Chavez-Echeverry with access to a dealership car and permission to drive on public roads. Defendants' ability to access Chavez-Echeverry's driving record and personnel file provided them with the means to confirm whether it was safe and reasonable to allow Chavez-Echeverry to drive dealership vehicles. Under the facts and circumstances presented here, we conclude it is fair to impose a duty on defendants to protect third parties such as plaintiff from employees who are unsafe drivers. Therefore we conclude defendants owed a duty to take reasonable steps to ensure Chavez-Echeverry was a safe driver.

Defendants arguably breached this duty because of Chavez-Echeverry's poor driving record, and reports of his insubordination and on-the-job drinking. A jury could reasonably find that defendants breached their duty of care by giving Chavez-Echeverry access to dealership cars, and that this breach was a proximate cause of the accident under review. Viewing the facts in the light most favorable to plaintiff, a reasonable jury could find defendants knew or should have known of Chavez-Echeverry's poor driving record, and reports of his insubordination and on-the-job drinking, which should have alerted defendants to the compelling need to promptly review and investigate whether they should continue to allow Chavez-Echeverry to drive dealership vehicles. Viewing the facts in the light most favorable to

plaintiffs, a reasonable jury could find it was foreseeable that Chavez-Echeverry would take an unauthorized trip in a dealership car causing a motor vehicle accident injuring a third party, such as plaintiff, therefore establishing proximate cause. The trial court erred in finding, as a matter of law, that defendants breached no duty to plaintiff regarding Chavez-Echeverry's unsafe driving.

Reversed and remanded. We do not retain jurisdiction.