[Cite as *Kestranek v. Crosby*, 2010-Ohio-1208.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93163

RAYMOND M. KESTRANEK, ET AL.

PLAINTIFFS-APPELLANTS

vs.

KEVIN R. CROSBY, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-654343

BEFORE: Boyle, J., Kilbane, P.J., and McMonagle, J.

RELEASED: March 25, 2010

JOURNALIZED:

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MARY J. BOYLE, J.:

{¶ 1} Plaintiffs-appellants, Raymond and Nadine Kestranek, appeal from the trial court's judgment granting summary judgment in favor of defendant-appellee, Ameritemps, Inc. They raise the following two assignments of error:

{¶ 2} "I. The trial court should not have granted summary judgment because the tortfeasor in this case was acting to satisfy a business obligation of the appellee's at the time of the accident.

{¶ 3} "II. Even if the workers' compensation, 'arising out of' element did apply to this case, reasonable minds could find that Ameritemps' employee's driving arose out of his employment."

{¶ 4} Because we find that the trial court erred in concluding that Crosby was not in the course and scope of his employment as a matter of law and reasonable minds could reach differing conclusions, we reverse the trial court's grant of summary judgment and remand for further proceedings.

Procedural History and Facts

{¶ 5} This case arises out of a motor vehicle accident involving Raymond Kestranek and defendant Kevin Crosby, resulting from Crosby's traveling left of center and striking Kestranek's vehicle. At the time of the accident, Crosby, along with three passengers in the vehicle, were all employed by Ameritemps, Inc. as temporary workers and were en route to Prime Woodcraft, a job site in Garettsville, Ohio.

{¶ 6} On October 11, 2006 — the day of the accident — Crosby appeared at Ameritemps' office location on Howard Street in Akron to pick up his daily "ticket." The ticket designates the job site for that day and tracks the temporary employee's hours, which is necessary to get paid. After receiving his ticket, Crosby left for the Prime Woodcraft job site in his own personal vehicle. In

addition to driving himself, Crosby transported three other Ameritemps employees to the job site: Tabious Harris, Calin Tucker, and Joe Wimbley. These four employees were the only Ameritemps employees assigned to Prime Woodcraft at the time of the accident.

{¶ 7} According to Phillip DeRosa, a dispatcher for Accurate Personnel, Inc. (the company that runs Ameritemps, Inc.), Ameritemps offers transportation to its temporary employees to the differing job sites but does not require them to use it unless the specific client requires it. For example, temporary employees assigned to the city of Kent had to ride in the company van because the client requested it. Generally, however, Ameritemps allows temporary employees to choose their mode of transportation. DeRosa explained that Ameritemps offers its van and that it will deliver the temporary employees to the job sites. He further explained: "We don't require you to take your own vehicle. We don't require you to take the bus. We make sure you get there on time. If you choose to take a bus back or drive out there on your own volition, that's your decision to make." If a temporary employee elects to ride in the van offered by Ameritemps, there is a standard fee deducted from the employee's daily wages for the cost of travel. In 2007, Ameritemps deducted five dollars from those temporary employees who chose to ride in the company van, no matter the distance of the job site.

{¶ 8} DeRosa further testified that Ameritemps does not force its employees to carpool to job sites. Regarding Crosby's transporting the other

three temporary employees, DeRosa stated that the employees made the arrangement on their own: "They wanted to ride with Crosby. They brought this to me. They came up to me and said, 'Hey, this guy's driving out there. We want to ride out there, and he's going to drive us.'" DeRosa further stated that as a courtesy to all the employees, if a temporary employee requested it, Ameritemps would deduct money from passengers' paychecks and pay the driver to cover the cost of gas. He further stated that the amount of money paid to Crosby for driving was decided by the other temporary employees, and no set amount was mandated by Ameritemps.

{¶ 9} Mark Dixon, Corporate Risk Manager of Accurate Personnel, Inc., corroborated DeRosa's testimony regarding Ameritemps' policy of providing transportation for its employees, stating that "it's the employees' responsibility to get themselves to the job site." But "[i]f they're unable to do so, we have the availability of transportation for them." He further stated that Ameritemps did not require its employees to take the company van or to carpool and denied any "prompting" by the dispatcher for the employees to carpool. As for Ameritemps deducting gas money from employees' paychecks and transferring it to those who drove, such as Crosby, DeRosa stated that the deduction was done simply as a "favor."

{¶ 10} Contrary to DeRosa's and Dixon's testimony, Calin Tucker and Tabious Harris (two of the passengers in Crosby's vehicle) testified that Ameritemps required its temporary employees to carpool when that option was

available.[1] According to Harris, the dispatcher told him that he had to ride with Crosby and that Ameritemps decided the amount of money to be deducted from his paycheck for the cost of transportation. Harris further testified that Ameritemps gave him the option of riding in its van to the Prime Woodcraft job site before he started riding with Crosby, but Ameritemps would only offer the van if "enough people were going out to the job site." Both Harris and Tucker further testified that, after Crosby started driving, Ameritemps stopped offering the van to the Prime Woodcraft job site because of the cost of gas.

{¶ 11} Following the accident, the Kestraneks commenced the underlying lawsuit, naming several parties and asserting inter alia that Ameritemps was vicariously liable for the negligent acts of its employee under a theory of respondeat superior.

{¶ 12} Ameritemps subsequently moved for summary judgment, arguing that Crosby was not in the course and scope of his employment at the time of the accident and asserting two arguments in support: (1) Crosby was a fixed-situs employee subject to the "coming and going rule"; and (2) the Kestraneks could not show that Crosby's operation of his car "arose out" of his employment. The Kestraneks opposed the motion, arguing that Crosby's transporting of himself and three other employees conferred a benefit upon Ameritemps, thereby rendering Crosby in the course and scope of his employment at the time of the accident.

[1]The record reflects that Ameritemps was unable to locate Kevin Crosby for deposition; therefore, his testimony was unavailable for purposes of its motion for summary judgment.

The Kestraneks further countered that the "arising out of" requirement was unique to workers' compensation cases and therefore inapplicable to a claim of respondeat superior.

{¶ 13} Finding that Crosby was not in the course and scope of his employment at the time of the accident as a matter of law, the trial court granted Ameritemps' motion for summary judgment. The Kestraneks appeal this decision.

Summary Judgment Standard of Review

{¶ 14} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 10, 746 N.E.2d 618. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 192, 699 N.E.2d 534.

{¶ 15} Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that "(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party."

State ex rel. Duganitz v. Ohio Adult Parole Auth. (1996), 77 Ohio St.3d 190, 191, 672 N.E.2d 654.

{¶ 16} The moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264. If the movant fails to meet this burden, summary judgment is not appropriate, but if the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. Id. at 293.

Respondeat Superior

{¶ 17} Under the doctrine of respondeat superior, an employer may be held liable for the negligent conduct of an employee acting within the scope of his or her employment. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 58, 565 N.E.2d 584; *Lipps v. Kash*, 12th Dist. No. 2007-05-060, 2008-Ohio-2628, ¶8. "It is well-established that in order for an employer to be liable under the doctrine of respondeat superior, the tort of the employee must be committed within the scope of employment." *Byrd* at 58; see, also, *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 329, 587 N.E.2d 825. Conversely, "[a]n employer is not liable for independent, self-serving acts of employees that, in no way, facilitate or promote the employer's business." *Patidar v. Tri-State Renovations, Inc.*, 10th Dist. No. 06AP-212, 2006-Ohio-4631, ¶9.

{¶ 18} Generally, the determination of whether an employee is within the scope of employment is a question of fact to be decided by a jury. *Osborne* at 330; *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 278-279, 344 N.E.2d 334. The Ohio Supreme Court has long recognized that "'the expression "scope of employment" cannot be accurately defined because it is a question of fact to be determined according to the peculiar facts of each case.'" *Rogers v. Allis-Chalmers Mfg. Co.* (1950), 153 Ohio St. 513, 526, 92 N.E.2d 677, quoting *Tarlecka v. Morgan* (1932), 125 Ohio St. 319, 181 N.E. 450. "Only when reasonable minds can come to but one conclusion does the issue regarding scope of employment become a question of law." *Osborne* at 330. Moreover, to decide the issue as a matter of law, the material facts must be undisputed and there must be no possibility of conflicting inferences. Id.

{¶ 19} In their first assignment of error, the Kestraneks argue that Crosby was satisfying a business obligation at the time of the accident, and therefore the trial court should not have granted summary judgment. In their second assignment of error, they argue that, even if the workers' compensation "arising out of" element applies, reasonable minds could find in their favor. Ameritemps, however, concedes that the "arising out of" requirement is unique to workers' compensation cases; it is not a necessary element of a respondeat superior claim. See *Faber v. Metalweld, Inc*. (1992), 89 Ohio App.3d 794, 798, 627 N.E.2d 642, citing *Rogers v. Allis-Chalmers Mfg. Co.*, 153 Ohio St.3d at 526.

Although it raised the argument in moving for summary judgment, Ameritemps now abandons same on appeal.

{¶ 20} The critical issue on appeal, therefore, is whether the trial court properly concluded that Crosby was not in the course and scope of his employment when his personal vehicle struck the Kestraneks. The application of respondeat superior (and corresponding liability of Ameritemps) hinges on this issue and whether the record supports the trial court's conclusion as a matter of law. We find that it does not.

{¶ 21} Ameritemps moved for summary judgment on the basis that Crosby was subject to the coming-and-going rule, arguing that his commute to Prime Woodcraft was not in the course and scope of his employment.

{¶ 22} The Ohio Supreme Court in *Boch v. New York Life Ins. Co.* (1964), 175 Ohio St. 458, 196 N.E.2d 90, paragraph one of the syllabus, recognized that an employer is liable for an employee's negligent use of the employee's personal vehicle when the following is established by a preponderance of the evidence:

{¶ 23} "(1) that the employer had expressly or impliedly authorized the employee to use his own automobile in doing the work he was employed to do,

{¶ 24} "(2) that the employee was at the time of such negligence doing work that he was employed to do, and

{¶ 25} "(3) that the employee was subject to the direction and control of the employer in the operation of the employee's automobile while using it in doing the work he was employed to do."

{¶ 26} It is well settled that mere travel to a fixed place of work does not constitute acting within the scope of employment. In recognizing this principle, the *Boch* court explained: "As a matter of law, a master is not liable for the negligence of his servant while driving to work at a fixed place of employment, where such driving involves no special benefit to the master other than the making of the servant's services available to the master at the place where they are needed." Id. at paragraph two of the syllabus; see, also, *Reese v. Fidelity & Guaranty Ins. Underwriter*, 158 Ohio App.3d 696, 2004-Ohio-5382, 821 N.E.2d 1052, ¶15; *Faber v. Metalweld, Inc.* (1992), 89 Ohio App.3d 794, 627 N.E.2d 642. Indeed, Ohio courts have routinely recognized that an employee's mere travel to a fixed job site, regardless of whether the employee is using a company vehicle, is insufficient to impose liability on an employer for the injuries sustained by third parties as a result of the employee's negligent driving. See, e.g., *Senn v. Lackner* (1952), 157 Ohio St. 206, 105 N.E.2d 49; *Davis v. Galla*, 6th Dist. No. L-08-1149, 2009-Ohio-984; *Kimble v. Pepsi-Cola General Bottlers* (1995), 103 Ohio App.3d 205, 206-207, 658 N.E.2d 1135 ("the required operation of a company vehicle to and from a fixed site of employment is not, without more, sufficient to hold the employer liable under a theory of respondeat superior").[2]

[2]The rule of law on traveling to and from a fixed place of work applies to cases in the context of uninsured-motorist coverage, respondeat superior, and workers' compensation. *Reese,* 2004-Ohio-5382, ¶16, citing *Rufo v. Nationwide Agribusiness Ins. Co.*, 5th Dist. No. 2003CA00291, 2004-Ohio-3855; *Boch*, 175 Ohio St. 458; *MTD Products, Inc. v. Robatin* (1991), 61 Ohio St.3d 66, 572 N.E.2d 661. This principle most commonly arises in the context of workers' compensation cases, however, and is referred to as the "coming-and-going" rule. Id.

{¶ 27} But Ohio courts have recognized an exception to this general rule when there is evidence of a "special benefit" to the employer other than the making of the employee's services available to the employer at the work place. See, e.g., *Boch*, 175 Ohio St. at paragraph two of the syllabus; *Hale v. Spitzer Dodge, Inc.*, 10th Dist. No. 04AP-1379, 2006-Ohio-3309; *Butler v. Baker* (1993), 90 Ohio App.3d 143, 628 N.E.2d 98; *Faber*, 89 Ohio App.3d 794. Further, "[i]f the conduct of an employee is actuated by a purpose to serve his master, the conduct may fall within the employee's scope of employment." *Wrinkle v. Cotton*, 9th Dist. No. 03CA008401, 2004-Ohio-4335, ¶16; see, also, *Davis*, 2009-Ohio-984, ¶16; *Martin v. Cent. Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 92, 590 N.E.2d 411 ("Conduct is within the scope of employment if it is initiated, in part, to further or promote the master's business").

{¶ 28} Moreover, at least one Ohio court has recognized that summary judgment is improper on a claim for respondeat superior when there is some evidence that the employee's use of her personal vehicle was "initiated, in part, to further or promote the master's business." *Ogrodowski v. Health & Home Care Concepts, Inc.*, 3d Dist. No. 9-99-54, 1999-Ohio-975.

{¶ 29} Applying a de novo standard of review, we find that the trial court erred in granting summary judgment; the record does not support the trial court's conclusion that Crosby was not in the course and scope of his employment as a matter of law.

{¶ 30} Ameritemps raised only one argument in support of its claim that Crosby was not in the course and scope of his employment at the time of the accident, i.e., that he was a fixed-situs employee subject to the coming-and-going rule. Relying on Harris and Tucker's deposition, Ameritemps argued that Crosby was a fixed-situs employee because (1) the temporary employees had no duties traveling to and from the job sites, and (2) they were not compensated for any travel, only for the work that they performed at Prime Woodcraft. In support of this claim, it relied on the Tenth District's decision in *Freeman v. Brooks*, 154 Ohio App.3d 371, 2003-Ohio-4814, 797 N.E.2d 520, which held that plaintiff's decedent was a fixed-situs employee. The plaintiff's decedent, much like Crosby, was a day laborer, who was injured in the course of traveling from the employer's dispatch office to the job site where he was assigned. The decedent was a passenger in his employer's van and was not compensated for his time spent in transportation to the job site. Id. at ¶11. The trial court found that the decedent was a "fixed-situs employee" because he only performed services for the employer at the job sites and not the employer's dispatch office. Id. at ¶13.

{¶ 31} But the court in *Freeman* also held that, despite being a fixed-situs employee, the decedent was in the course of his employment at the time of his death because he was traveling "'to the premises of one of his employer's customers to satisfy a business obligation.'" Id. at ¶14, quoting *Ruckman v. Cubby Drilling Co., Inc.* (1998), 81 Ohio St.3d 117, 121, 689 N.E.2d 917. Notably, the plaintiff conceded that the decedent's death occurred in the course

of his employment, so this was neither an issue at the trial court nor on appeal. Id. Thus, *Freeman* provides no authority for concluding that Crosby was not in the course of his employment at the time of the accident. To the contrary, it supports the Kestraneks' claim. Indeed, the gravamen of Ameritemps' motion for summary judgment focused on the argument that there was not a sufficient causal connection between Crosby's accident and his employment (i.e., the "arising out of" element) — the very argument that Ameritemps properly abandons now on appeal. We therefore find that Ameritemps failed to demonstrate that it was entitled to judgment as a matter of law.

{¶ 32} The record reveals that Crosby was not only transporting himself but three other individuals to the client's location, Prime Woodcraft, providing labor on behalf of Ameritemps, his employer. The record also contains testimony that Ameritemps required Harris and Tucker to drive with Crosby from Ameritemps' dispatch office and that Ameritemps stopped providing a van once Crosby started driving. The record further reveals that Ameritemps transferred money from the paychecks of those employees who rode with Crosby to Crosby's paycheck to compensate him for driving. Although Ameritemps characterizes its policy as a "mere favor" done for its employee, a conflicting inference can be made: Ameritemps transferred the money because it wanted Crosby to drive the other temporary employees in furtherance of its business. And while Ameritemps attempts to distance itself from its employees' practice of riding together from the dispatch office, reasonable minds could find that they facilitated and promoted

this arrangement. Indeed, an inference can be made that Ameritemps required Crosby to drive the other employees. Construing this evidence in a light most favorable to the Kestraneks, and given the conflicting inferences that can be drawn from the undisputed facts, we find that Ameritemps is not entitled to judgment as a matter of law.

{¶ 33} As for the Kestraneks' request that this court find that Crosby was within the course and scope of his employment as a matter of law, we decline to do so. The Kestraneks argue that Crosby was not subject to the coming-and-going rule while traveling from Ameritemps' dispatch office to the client's location. They further argue that the record establishes that Crosby, who was transporting three other temporary employees to the client's location, was acting in furtherance of Ameritemps' business at the time of the accident. The Kestraneks, however, never moved for partial summary judgment in the trial court, asking the court to declare that Crosby was in the course and scope of his employment at the time of the accident. Therefore, despite their request for this court to make such a finding on appeal, we are limited to our de novo review and cannot provide a party with relief that they did not first seek below. See *Egan v. Natl. Distillers & Chem. Corp.* (1986), 25 Ohio St.3d 176, 495 N.E.2d 904. Indeed, "[c]laims raised for the first time on appeal are not justiciable because appellate courts do not engage in advisory opinions." *Bentleyville v. Pisani* (1995), 100 Ohio App.3d 515, 517-518, 654 N.E.2d 394.

{¶ 34} Accordingly, having found that the trial court erred in granting Ameritemps' motion for summary judgment, we sustain the Kestraneks' first assignment of error in part and find the second assignment of error to be moot.

Judgment reversed and case remanded for further proceedings.

It is ordered that appellants recover of appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR