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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2001-CA-001501-MR

GARNETT WILLIAMS — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 00-CI-00847

IRWIN MORTGAGE CORPORATION — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, BUCKINGHAM, and COMBS, Judges.

COMBS, JUDGE: Garnett Williams filed a complaint in the Boyd Circuit Court seeking to recover damages for personal injuries she suffered in an automobile accident. Williams named as defendants Terri Anderson, the driver of the car which collided with hers, and Anderson's employer (the appellee), Irwin Mortgage Corporation. The trial court concluded as a matter of law that Anderson was not acting within the scope of her employment at the time of the accident and granted the motion of Irwin Mortgage to be summarily dismissed from the lawsuit. Williams appeals from the summary judgment, which was made final and appealable by the inclusion of CR[1] 54.02 recitals. Finding no error, we affirm.

[1]Kentucky Rules of Civil Procedure.

The accident in which Williams was injured occurred on September 15, 1999. In her complaint, Williams alleged that immediately prior to the accident, she was stopped at a traffic light and observed in her rear-view mirror Anderson's vehicle approaching in her lane of traffic. Williams alleged that at the moment of collision, Anderson had been talking on a hand-held cellular telephone and that she was making reference to papers on the front seat of her vehicle. In addition to her claim against Anderson for negligence, Williams asserted a claim against Anderson's employer under the doctrine of *respondeat superior*, contending that Anderson was acting within the course and scope of her employment at the time of the accident. She sought both compensatory and punitive damages.

In their joint answer to the complaint, both Anderson and Irwin Mortgage denied that Anderson was acting in the course and scope of her employment at the time of the accident. In her deposition, Anderson testified that she was employed by Irwin Mortgage as the office manager beginning in June of 1999. Her duties included paying their monthly bills, supervising employees, and processing loans. Anderson stated that the cell phone in her automobile was her own phone and that she used it if she were out of the office "to see if [the other employees] needed anything or [to] give them a message." On the day of the accident, Anderson was taking a late lunch break. She left the office in her own automobile and went to the bank to make her house payment. She stopped at a drive-through window of a fast-food restaurant and used her cell phone to see if anyone at the

office wanted her to bring back food for lunch. Shortly after leaving the restaurant, she collided with the rear end of Williams's vehicle, which was stopped at a traffic light. Anderson denied that she was using the phone at the time of the collision and testified that she used the phone immediately after the accident to call police and to call her office to let them know that she would be arriving late.

Irwin Mortgage moved for summary judgment and contended that Anderson was not its agent at the time of the accident. In granting that motion, the trial court reasoned as follows:

> An employer is not an insurer of its employee's activities, but is liable for the acts of its employee which are performed for the employer's business. For an employer to be liable for an employee's tort, the employee must be performing duties for her employer within the scope of her employment. If an employee is outside the scope of her employer's business, to perform an act not connected with her employer's business, the master/servant relationship is suspended. The simple fact that Ms. Anderson was employed when the accident occurred is not sufficient by itself to impose liability on her employer. As Ms. Anderson was on personal errands and not on any business of her employer, her collision with the car driven by [Williams] was not an act within the scope of her employment at Irwin Mortgage Corporation.
>
> Calling the office to see if other employees wanted to bring lunch was neither part of her job, nor connected with her job duties. At best it was a social courtesy, and not a corporate function. That act was insufficient as a matter of law to bring her personal trip within the scope of her employment for the purpose of seeking to hold Irwin Mortgage Corporation, her employer, liable for the claim of [Williams].

In considering a motion for summary judgment, a trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991), citing Paintsville Hospital v. Rose, Ky., 683 S.W.2d 255 (1985). Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances." Id. at 480. On appeal, our task is to review the summary judgment in order to determine "whether the trial court correctly found that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

In order to recover against a employer under the doctrine of *respondeat superior* for damages resulting from a vehicular accident, the plaintiff must establish the existence of an employer/employee relationship and must demonstrate that the employee's use of the automobile was "in furtherance of his employer's interest or within the scope of his agency when the accident occurred." Higgans v. Deskins, Ky., 263 S.W.2d 108, 110 (1953); see also, Saunders' Executors v. Armour & Company, 220 Ky. 719, 295 S.W. 1014 (1927); Creamer v. Kroger Grocery & Baking Co., 260 Ky. 544, 86 S.W.2d 288 (1935). It is undisputed that Anderson was an employee of Irwin Mortgage at the time of the accident. Therefore, the sole issue for our determination is whether the trial court erred in concluding that Anderson was not

acting in the scope of her employment when she collided with Williams.

In the recent case of Osborne v. Payne, Ky., 31 S.W.3d 911, 915 (2000), the Kentucky Supreme Court, re-visiting Wood v. Southeastern Greyhound Lines, 302 Ky. 110, 194 S.W.2d 81 (1946), reiterated that in order for conduct to fall within the scope of employment, it "must be of the same general nature as that authorized or incidental to the conduct authorized." Both Wood and Osborne involve intentional torts. However, regardless of whether an employee's harmful conduct is the result of a negligent or an intentional act, an employer is vicariously liable only when the employee is acting "in the furtherance of the master's business[.]" Wilson v. Deegan's Adm'r, 282 Ky. 547, 139 S.W.2d 58, 60 (1940). Thus, an employer is generally not liable for its employee's negligence while travelling to and from meals — even in those situations where the employee is driving his employer's vehicle. Id.

Williams argues that the issue of Irwin Mortgage's liability was not appropriate for summary judgment and that the issue was one for the jury's determination. Specifically, she contends that Anderson "was conferring a substantial benefit" on Irwin Mortgage "by bringing food to her co-workers so that they did not have to leave to go get lunch." However, there was no evidence submitted in response to the motion for summary judgment that fetching lunch for her co-workers was a part of Anderson's job duties as the office manager or that it provided any benefit to Irwin Mortgage.

Construing the evidence most favorably for Williams as we must, we agree with the trial court that Anderson was engaged in a personal mission unrelated to her work. She was on her lunch hour, using her personal automobile, and talking on her personally owned cell phone. The fact that her employer may have arguably enjoyed some incidental benefit does not alter her legal status with reference to her employment at the time of the accident. See Dr. Pepper Bottling Co. Of Kentucky v. Kazelip, 284 Ky. 333, 144 S.W.2d 798 (1940), where the court held that the employer of a route salesman was not liable for injuries resulting from an accident caused by the employee using his own car on the weekend even though the employee was travelling with his supervisor to a fair where the company's products would be sold.

> To hold a master liable whenever a servant does something in his behalf would be an unreasonable rule.

Id. at 800. See also, Roselle v. Bingham, 242 Ky. 496, 46 S.W.2d 784 (1931), where the court absolved the employer from any liability for an accident caused by his employee while operating his own car to run personal errands -- cashing a pay check, making a car payment and buying cigarettes -- even though he also took his employer's tennis racket to be repaired and his employer's trousers to the tailor.

As Williams points out, issues involving the scope of employment frequently arise in the context of workers' compensation cases. However, in that context, workers off the employer's premises (going back and forth to work or to meals)

are generally not compensated for their injuries. For example, in Baskin v. Community Towel Service, Ky. 466 S.W.2d 456 (1971), the court affirmed the denial of compensation benefits to two workers injured in an automobile accident on their return from lunch, holding as follows:

> Professor Larson, who restated the positional-risk doctrine and who analyzed and approved the expansion of the operational-premises principle, also recognizes that when an employee with fixed time and place of work has left the premises for lunch, he is outside the course of his employment while off the employer's premises during the lunch break "if he falls, is struck by an automobile crossing the street" or is the victim of some other non-work-connected accident. . . . We are constrained to believe that if we hold appellants' claims to be compensable we would thereby convert our workmen's compensation law into an accident insurance program against the hazards of traffic with the premiums paid by one's employer.

Id. at 458. A similar result was reached in Heffren v. American Medicinal Spirits Corporation, 272 Ky. 588, 114 S.W.2d 1115, 1116 (1938), where the court found that an accident occurring off the employer's premises and at a time when the employee "was acting solely in his own interest and for his own convenience" was not in furtherance of the master's business.

The facts in this case are unique from all the earlier precedent because of the employee's use of a cell phone providing her the means of communicating with her office while off the premises. This technological innovation does not deviate substantially from the established body of law; *i.e.*, an employee away from the employer's premises conducting personal business is not acting within the scope of her employment. We agree with the

reasoning of Le Elder v. Rice, 21 Ca. App. 4th 1604, 1610, 26 Cal.Rept. 2d 749, 753 (1994):

> Modern technology has changed the means by which we communicate. Beepers, pagers, facsimile machines and cellular phones keep us literally at a fingertip's distance from one another. But on-call accessibility or availability of an employee does not transform his or her private activity into company business. The first question must always focus on scope of employment. Where the injury-producing activity is beyond that scope, no totality of other circumstances will result in respondeat superior liability.

We find no error in the reasoning and conclusion of the Boyd Circuit Court that the accident did not arise out of Anderson's employment with the appellee. Therefore, we affirm the judgment.

ALL CONCUR.

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