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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001769-MR

CARL J. O'BANNON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 14-CI-004559

THE BOYS & GIRLS CLUB, INC.;
THE BOYS & GIRLS CLUB OF KENTUCKIANA;
KENTUCKY FARM BUREAU
MUTUAL INSURANCE COMPANY; AND
EDDIE L. WOODS — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND MAZE, JUDGES.

MAZE, JUDGE: Carl J. O'Bannon appeals from a summary judgment entered by the Jefferson Circuit Court dismissing his claims against the Boys & Girls Club, Inc. and the Boys & Girls Club of Kentuckiana (collectively, BGCK). O'Bannon

argues that the trial court erred in finding as a matter of law that BGCK's employee, Eddie L. Woods, was not acting within the scope of his employment at the time of the traffic accident at issue in this case. We conclude that there were genuine issues of material fact whether Woods was acting within the scope of his employment, and therefore, summary judgment was not appropriate on this issue. Hence, we reverse and remand for additional proceedings.

For purposes of this appeal, the following facts are not in dispute. BGCK is a non-profit organization which provides a variety of services to children between the ages of six and eighteen. Among its other services, BGCK operates "Clubs" at five locations in the Louisville and Southern Indiana areas. The Clubs offer after-school activities and a "safe haven" for youth in at-risk communities. Children who participate in BGCK programming are known as Club "members."

Woods was employed as a part-time Teen Coordinator at BGCK's Parkland Club, located at 3200 Greenwood Avenue in Louisville. His primary responsibilities were to recruit youth between the ages of thirteen and eighteen, and to oversee the delivery of programming. In addition, Woods's job description assigned him various record-keeping, administrative, and partnership-development responsibilities, and further provided that he "[m]ay be required to drive [a] Club van."

In January 2014, BGCK announced a "Safe Passage Policy" applicable to all members. The policy provided that, after a member left a Club facility, he or she may not return until the following day. The purpose of the policy was to encourage members to stay at the Club as long as possible, rather than leave unsupervised. The policy provided that members under the age of twelve must be picked up by a parent or designated adult, and that members over the age of twelve could choose to walk home with written permission and a waiver of liability.

The parties agree that the Parkland Club is located in a high-crime neighborhood with significant gang activity. Given the potential danger to members who left the Club at closing time, Woods and several other employees transported members home in their personal vehicles. Woods states that his supervisors and the members' parents were all aware of the practice and had tacitly approved of it. However, BGCK contends that the practice had never been formally approved and violated its written policies against employees transporting members in their personal vehicles.

On the evening of March 10, 2014, Woods's shift ended when the Parkland Club closed at 8:00 p.m. He had arranged to drive home a total of three Club members and one adult volunteer. After leaving the Club, Woods dropped off a member who lived at 35th Street and Algonquin Parkway. He then proceeded

to take another member home near 10th and Jefferson Streets. While on route, Woods's vehicle collided with a motorcycle operated by O'Bannon. The accident occurred at 8:20 p.m., approximately fourteen minutes after leaving the Parkland Club.

On September 3, 2014, O'Bannon filed a complaint against Woods and against BGCK as Woods's employer. BGCK states that the complaint was its first notice of the accident or that Woods claimed to be acting within the scope of his employment. Woods states that he told his co-workers about the accident a few days after it happened, but he admits that he never submitted a formal report.

Shortly after the accident, BGCK modified its policies to prohibit transportation of members in personal vehicles. After receiving notice of O'Bannon's claim, BGCK also issued a "Corrective Action Notice" against Woods for violation of the policy, and it required him to sign a "Driver Policy Statement," which acknowledged the new policy. Woods questioned both the propriety of the reprimand and its timing. Woods also noted that BGCK's "Vehicle Use and Safety Policy," on which BGCK relied in part to issue the Corrective Action Notice, was dated June 5, 2014.

Following discovery and a six-month stay due to Woods filing bankruptcy, BGCK filed a motion for summary judgment. BGCK argued that, as a matter of law, it was not vicariously liable for Woods's negligence because he was

acting outside the scope of his employment when the accident occurred. After considering the record and arguments of counsel, the trial court agreed and granted BGCK's motion. The court held that Woods was acting outside of BGCK's official policy provisions and the scope of his employment.

> Further, because Woods was acting outside official policy provisions, BGCK had no control over his actions after his shift ended and the children had already departed from BGCK's premises. Woods['s] deposition makes clear his own altruistic intent was his reason for transporting others to their homes in his personal vehicle. That fact that other employees were similarly helpful on a regular basis does not render their actions subject to the control of BGCK. The actions of Woods and the other employees were undertaken through their own motivation, not any motivation of their employer.

On appeal, O'Bannon argues that BGCK was not entitled to summary judgment because there were genuine issues of material fact whether Woods was acting within the express or implied scope of his employment. The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there were "no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law." CR[1] 56.03. In *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985), the Kentucky Supreme Court held that for summary judgment to be proper, "the movant shows that the adverse party could not prevail under any circumstances." *Id.* at 256.

Our Supreme Court also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). However, the word "impossible" "is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest*, 807 S.W.2d at 481 (internal quotations and citations omitted). "Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no deference to the conclusions of the trial court." *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

[1] Kentucky Rules of Civil Procedure.

The controlling question on appeal is whether there was sufficient evidence to establish that Woods was acting within the scope of his employment while transporting the Club members home. In *Papa John's Int'l, Inc. v. McCoy*, 244 S.W.3d 44 (Ky. 2008), the Kentucky Supreme Court adopted the test set out in the RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006) for determining whether an employer is liable for the negligent acts of an employee.

> (1) An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.
> (2) An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.
> (3) For purposes of this section,
>
> (a) an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work, and
> (b) the fact that work is performed gratuitously does not relieve a principal of liability.

Id. at 51-52.

The *McCoy* court went on to note that the Restatement rule is consistent with the common-law standard for determining an employer's vicarious liability for the acts of an employee: That is; "[I]n general, . . . the master is held liable for any intentional tort committed by the servant where its purpose, however

misguided, is wholly or in part to further the master's business." *Id.* at 52 (quoting W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* 505 (5th ed. 1984)). On the other hand, if the servant "acts from purely personal motives ... which [are] in no way connected with the employer's interests, he is considered in the ordinary case to have departed from his employment, and the master is not liable." *Id.* (quoting Keeton, *supra*). Both the Restatement and the common law take the position that when the employee acts for solely personal reasons, the employer's ability to prevent the tort is limited, and thus, the employer is not liable for the acts of the employee. *Id.* (citing *Patterson v. Blair*, 172 S.W.3d 361, 369 (Ky. 2005)).

As noted above, the trial court found that Woods was not acting in furtherance of BGCK's interests, but was acting solely from his own altruistic motivations. In support of this conclusion, the trial court first noted that there was no official policy of BGCK that employees were to follow in taking members home. The court further observed that the express policy of BGCK prohibited employees from transporting members in their personal vehicles.

However, BGCK did not adopt such an express policy until after the accident at issue. Prior to the accident, BGCK had adopted a "Child Abuse/Safety Policy," that included a section styled "Protect Yourself from Allegations." The section set out set out a number of policies and provided that "[a]ny staff member

who violates the following policies will face disciplinary action, up to and including termination." Included among other policies set out under this section was the following language:

> **Never tickle, kiss or horseplay with members. Never allow members to sit on your lap, or engage in other behavior that may be perceived as inappropriate. Never allow members in your personal vehicle.**

(Bold in original.)

The pre-accident policy indicates that employees who transported members in a personal vehicle could be subject to disciplinary action, including termination. However, the policy was specifically directed toward avoiding contact with minors that would be perceived as inappropriate, rather than as a general prohibition against the practice of transporting members in personal vehicles. Indeed, BGCK believed it was necessary to adopt a new policy after the accident which expressly prohibited employees from transporting members home in personal vehicles.

Furthermore, O'Bannon points to BGCK's "Safe Passage" Policy, which encouraged employees to consider the safety of Club members above anything else. To that end, the Safe Passage Policy required that employees supervise Club members at all times. In his deposition testimony, Woods stated that he and other employees at the Parkland Club believed that the policy included

making sure that Club members made it home safely, particularly when they lived or had to walk through high-crime neighborhoods.

Woods further testified that it was "common practice" for employees to transport members home after the Club closed. Several other employees engaged in the practice, and the members' parents were aware of it. Woods even stated that, "it was kind of expected" of employees to take members home. Moreover, Woods testified that his direct supervisor, Makada Woods,[2] was aware of the practice and she also transported members home on a regular basis. Makada Woods was the Program Director of the Parkland Club.

Against this evidence, BGCK and the trial court cite to Woods's statements after the accident in which he admitted that he was not acting within the scope of his employment. Furthermore, Woods admitted that he did not formally advise BGCK of the accident immediately after it occurred because it occurred after working hours and in his own car. He also acknowledged that he would have been required to report the accident, fill out an accident report, and submit to a drug test if he had been driving a Club-owned vehicle at the time of the accident. Based on this evidence and the policies in effect at the time of the accident, BGCK argues that Wood was not subject to its control at the time of the accident, but was acting entirely for his own purposes.

[2] No relation.

However, the employee's subjective motivations are not entirely controlling to determine whether he was acting within the scope of his employment. Rather, the test is whether the employee intended to further his master's business. *Patterson*, 172 S.W.3d at 366. An employee may be acting within the scope of his employment when his conduct is of the same general nature as that authorized or is incidental to the conduct authorized. *Osborne v. Payne*, 31 S.W.3d 911, 915 (Ky. 2000) (citing *Wood v. Southeastern Greyhound Lines*, 302 Ky. 110, 194 S.W.2d 81 (1946)).

Based on the record before us, we conclude that there were genuine issues of material fact whether Woods was acting within the scope of his employment. While there was evidence to support a finding that Woods was acting on his own accord, there was also substantial evidence supporting a contrary conclusion. Notwithstanding the written policy, there was clearly evidence that Woods's supervisors condoned and approved the practice of driving members home after the Club closed. There was also evidence that Woods's supervisor believed that the practice furthered BGCK's interests by ensuring that Club members got home safely even when they stayed until closing time. For this reason, the practice could be considered as at least incidental to matters within the scope of Woods's employment. Considering the high standard required to grant

the motion, we must conclude that summary judgment was not appropriate on this question at this point in time.

Accordingly, we reverse the summary judgment by the Jefferson Circuit Court, and we remand for additional proceedings in accord with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lawrence I. Young
Louisville, Kentucky

BRIEF FOR APPELLEES, THE BOYS & GIRLS CLUB, INC. AND THE BOYS & GIRLS CLUB OF KENTUCKIANA:

Peter J. Sewell
Thomas N. Peters
Louisville, Kentucky