IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WARREN H. KAYE, AN INDIVIDUAL,
Appellant,
vs.
JRJ INVESTMENTS, INC., D/B/A BMW OF LAS VEGAS,
Respondents.

No. 74324-COA

ORDER OF AFFIRMANCE

Warren H. Kaye appeals from a district court summary judgment in a tort action. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Kaye was riding his bicycle in front of BMW of Las Vegas when Ahmed Bencheikh, a dealership employee, drove out of the dealership's driveway and allegedly struck Kaye. Kaye sued Bencheikh, Auto Nation, Inc., and JRJ Investments, Inc., d/b/a BMW of Las Vegas ("BMW") for negligence, negligent entrustment, and respondeat superior, asserting Bencheikh was driving a company car and negligently hit Kaye. After the parties settled the claims against Bencheikh and Auto Nation, as well as the negligent entrustment claim against BMW, BMW moved for summary judgment on the remaining respondeat superior claim, arguing Bencheikh was not under its control or working in the course and scope of his employment at the time of the accident. The district court granted summary judgment in BMW's favor.[1]

On appeal, Kaye contends the district court erred in granting summary judgment, arguing that whether Bencheikh was under the

[1]We do not recount the facts except as necessary to our disposition

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defendant's control or acting in the scope of his employment at the time of the accident was a question of fact for the jury. We disagree that summary judgment was improper under the particular facts of this case.

We review a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.*

To prevail on a theory of respondeat superior, the plaintiff must establish both that (1) the employee who caused the injury was under the employer's control, and (2) the act occurred within the scope of the employment. *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 1223, 925 P.2d 1175, 1179 (1996). Generally, this presents a question of fact for the jury. *See Kornton v. Conrad, Inc.*, 119 Nev. 123, 125, 67 P.3d 316, 317 (2003) (addressing the scope of employment); *Molino v. Asher*, 96 Nev. 814, 816-18, 618 P.2d 878, 879-80 (1980) (addressing factual questions regarding the control and the scope of employment). Summary judgment may nevertheless be appropriate where undisputed evidence establishes the employee's status at the time of the incident. *See Molino*, 96 Nev. at 817-18, 618 P.2d at 879-80 (concluding summary judgment was proper where the undisputed evidence established that, as to the scope and course of employment, the employer could not be liable under the respondeat superior doctrine).

Critically here, Nevada courts have long recognized the "going and coming rule," which provides that "[t]he tortious conduct of an employee

in transit to or from the place of employment will not expose the employer to liability, unless there is a special errand which requires driving." *Kornton*, 119 Nev. at 125, 67 P.3d at 317 (quoting *Molino*, 96 Nev. at 817, 618 P.2d at 879-80); *see also Nat'l Convenience Stores, Inc. v. Fantauzzi*, 94 Nev. 655, 658, 584 P.2d 689, 691-92 (1978) (addressing the going and coming rule and the "special errand" exception). Our supreme court has held that this rule encompasses accidents that occur when an employee is entering or leaving the employer's parking lot. *See Molino*, 96 Nev. at 817, 618 P.2d at 880 ("Many courts have held, in accordance with our holding, that parking lot accidents under the 'coming and going' rule are not sufficiently within the scope of employment to warrant respondeat superior liability."). Thus, an off-duty employee's car accident will not give rise to liability under respondeat superior where no evidence suggests that the employee was on a special errand that would further the employer's interests or otherwise give the employer control over the employee. *See Kornton*, 119 Nev. at 125, 67 P.3d at 317.

Here, the undisputed evidence established that at the time of the accident, Bencheikh was on a break, in his personal vehicle, and leaving the premises to purchase a cup of coffee for himself. Critically, nothing in the record suggests that Bencheikh was engaged in a special, job-related errand that required driving or furthered BMW's business interests. *Cf. Nat'l Convenience Stores*, 94 Nev. at 659, 584 P.2d at 692 (affirming a jury verdict finding the employer liable under respondeat superior where the employee was involved in a car accident while traveling between the employer's business locations to measure shelves for a business project). Moreover, the evidence does not suggest that BMW had control over Bencheikh while he was physically out on this break, as Bencheikh was not

a salaried employee and was not paid during his break, he did not receive reimbursement for travel, and BMW did not direct him to get the coffee. *Cf. Kornton*, 119 Nev. at 125-26, 67 P.3d at 317 (concluding summary judgment in favor of the employer was proper where the subject employee was an hourly employee who worked on a field crew and was involved in the accident while driving his personal vehicle from home to a job site). Under the particular facts of this case, therefore, we conclude BMW is not liable under a theory of respondeat superior. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Ronald J. Israel, District Judge
Thomas J. Tanksley, Settlement Judge
Law Offices of Eric R. Blank
William B. Palmer, II
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Eighth District Court Clerk