

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATALIE WHITE LESSER and : CIVIL ACTION
HARVEY LESSER, h/w :
 :
v. :
 : NO. 96-8121
NORDSTROM, INC., et al. : NO. 97-6070

MEMORANDUM AND ORDER

HUTTON, J.

August 13, 1998

Presently before this Court is the Motion by Defendant Nordstrom, Inc. for Summary Judgment (Docket No. 12). For the reasons stated below, the defendant's Motion is **GRANTED**.

I. BACKGROUND

Taken in the light most favorable to the non-moving party, the facts are as follows. From February of 1996 through July of 1997, Defendant Carmencita Aseron ("Aseron") was employed as a fashion director by defendant Nordstrom, Inc. ("Nordstrom") at Nordstrom's King of Prussia, Pennsylvania department store. Aseron Dep. at 13, 18, 20-21, 23. Although Aseron was working in King of Prussia, she lived at her parents' home in Marlton, New Jersey from March of 1997 through May of 1997. Id. at 23-24. Aseron traveled to and from work from that location, approximately a forty-five minute drive. Id. at 71. In March and April of 1996, Aseron worked ten hours a day at times, and frequently worked six days each week. Id. at 64, 65.

On April 30, 1996, Aseron started working at 5:30 a.m. and continued for approximately twelve hours. Id. at 87. It was raining when Aseron left work at about 5:30 p.m., and it continued to rain as Aseron began her drive to Marlton. Id. at 86, 92. By approximately 6 p.m., Aseron was driving east on Route 30 in Camden City, New Jersey. Pls.' Compl. ¶ 10. Plaintiffs Harvey and Natalie Lesser were also driving east on Route 30. Then, "[w]ithout warning or signal of any kind," Aseron "spun or permitted her vehicle to spin around, positioning it sideways in the roadway, suddenly blocking plaintiffs path of travel and causing plaintiffs' vehicle and [Aseron's] vehicle to violently collide." Id. ¶ 11. The plaintiffs sustained serious injuries as a result of the collision. Id. ¶ 16.

The plaintiffs initiated the instant action by filing a complaint against Aseron on October 17, 1996, in the Court of Common Pleas of Philadelphia County. On September 26, 1997, the plaintiffs filed suit against Nordstrom in the United States District Court for the Eastern District of Pennsylvania ("Eastern District"). In their complaint, the plaintiffs assert various claims against Nordstrom, based on the following state law tort theories: (1) negligence; (2) loss of consortium; and (3) negligent infliction of emotional distress.

On December 6, 1996, Aseron removed the initial suit against her from the Court of Common Pleas of Philadelphia County to the

Eastern District. On April 28, 1998, this Court consolidated the plaintiffs' suits against Aseron and Nordstrom. On May 14, 1998, Nordstrom filed the instant Motion for Summary Judgment.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "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 and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. Id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993).

Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

B. Applicable Law

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652. When, as in the present case, this court sits in diversity, it must apply the substantive law of the state in which it is located. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Thus, Pennsylvania law controls in the instant case.

C. Respondeat Superior

"Liability attaches to a master by reason of a servant's negligent injury of a third person only when the servant is acting within the scope of h[er] employment." Cesare v. Cole, 210 A.2d 491, 493 (Pa. 1965) (citing Restatement (Second) of Agency § 219; Klovacs v. Bethlehem's Globe Publ'g Co., 202 A.2d 46 (Pa. 1964)).

"Generally, the scope of a servant's employment is a fact question for the jury. Anzenberger v. Nickols, 413 Pa. 543, 198 A.2d 309 (1964). Where the facts are not disputed, however, the question of whether or not the servant is within the scope of his or her employment is for the court." Ferrell v. Martin, 419 A.2d 152, 155 (Pa. Super. Ct. 1980), appeal dismissed, 452 A.2d 1018 (Pa. 1982) (citations omitted).

Whether an employee was acting within the scope of her employment at the time of an accident, "turns on whether, under Pennsylvania law, [her] conduct was incidental to [her] employment, i.e., whether [s]he was performing acts of the type [s]he was employed to perform and was actuated, at least in part, by a purpose to serve the employer." United States v. New Jersey Mfrs. Co., 583 F. Supp. 579, 581 (E.D. Pa. 1984). "The well-established rule . . . is that traveling to the job is insufficient, absent special circumstances, to justify the conclusion that the employee was acting within the scope of [her] employment." Wilson v. United States, 315 F. Supp. 1197, 1198 (E.D. Pa. 1970) (citations omitted).

In the seminal case of Cesare v. Cole, the Supreme Court of Pennsylvania discussed the application of respondeat superior liability where an employee caused an accident while driving a car to a job site. In Cesare, an employee arrived for work driving his own car just prior to his 7:00 a.m. starting time. Cesare, 210

A.2d at 493.

After receiving instructions as to the location where he would be reporting that day, the employee left in his personal car for the construction site at 7:15. The employer, the Township of Bushkill, provided transportation for the members of the employee's crew by means of a truck. On the way to the site, the individual employee's car collided with another car which resulted in the death of the passenger in that car. The Supreme Court [of Pennsylvania] . . . affirmed the lower court's granting of a compulsory non-suit [with regard to the employer]. The court reasoned that even though the employee had begun work, at the time of the accident, he was not within the scope of his employment because the employer did not direct the employee to use his car and it was not vitally important, reasonably necessary, or for the benefit of the employer that he did so.

Wilson, 315 F. Supp. at 1198-99 (discussing Cesare, 210 A.2d at 493-495). Moreover, the court stated that "[a]lthough being paid for the time consumed while driving, [the employee] was not being paid for the driving itself, and he would have been equally paid had he been riding on the township truck. [Thus, i]n so driving his automobile to the area of work, [the employee] was not acting within the scope of his employment, and there, no liability could attach to the township for negligently so doing." Cesare, 210 A.2d at 495.

In the instant action, this Court cannot find Nordstrom liable under a theory of respondeat superior. Aseron was driving home from work when the accident occurred. Moreover, she was not conducting business on Nordstrom's behalf at the time of the

accident. Aseron Dep. at 100-03. Accordingly, this case falls squarely into the general rule expressed in Cesare: an employee is not acting within the scope of her employment when she drives to or from her place of employment. Thus, this Court finds that Nordstrom cannot be held vicariously liable for Aseron's alleged negligent driving at the time of the accident, and, as such, the defendant's motion must be granted in this respect.

D. Nordstrom Inc.'s Direct Negligence

The plaintiffs attempt to proceed on the theory that Nordstrom was directly negligent in allowing a fatigued employee to drive home after completing a tiring work day. The plaintiffs contend that Aseron was so tired after working twelve hours the day of the accident that Nordstrom should have foreseen the risk that her fatigue could cause an accident. Moreover, the plaintiffs assert that Nordstrom had a duty to protect other drivers from this harm.

The plaintiffs do not cite and, after extensive research, this Court cannot find any Pennsylvania case law supporting the plaintiffs' theory of recovery. The plaintiffs instead rely primarily on opinions from two foreign state courts and ask this court to adopt the reasoning used in those cases. However, this Court finds these cases plainly distinguishable. Moreover, this Court holds that the plaintiffs' claim against Nordstrom must fail under present Pennsylvania law.

The first case the plaintiffs rely on is Faverty v. McDonald's Restaurants, 892 P.2d 703 (Or. Ct. App. 1995). In Faverty, the Supreme Court of Appeals of West Virginia was faced with a unique situation, where an employee fell asleep while driving home from work, causing an accident that killed the employee and severely injured the plaintiff. There, the employer "was aware that at least two of its employees had recently had automobile accidents as a result of falling asleep while driving home from work." Id. at 709. Moreover, the employee, a high school student, worked three shifts throughout the night in a seventeen hour period on the day of the accident, from 3:30 p.m. to 7:30 p.m., then from 12:00 a.m. through 5 a.m., and again from 5:00 a.m. to 8:21 a.m. Id. at 705. The plaintiff presented evidence that the employee "was visibly fatigued, and that defendant's managers were on site and saw [the employee] throughout that shift." Id. at 710. Accordingly, the Faverty court found that a reasonable jury could conclude that the defendant knew or should have known that "working [the employee] so many hours would impair his ability to drive home safely." Id.

Similarly, the plaintiffs rely on Robertson v. LeMaster, 301 S.E.2d 563 (W. Va. 1983), a case decided by the Court of Appeals of Oregon. In Robertson, the employee was a nineteen year old section laborer, who fell asleep on the way home from work and drove his car into the plaintiff's automobile, causing an accident. The employee normally worked from 7:00 a.m. to 3:30 p.m. Id. at 564.

On the day of the accident, though, the employee was transported to an emergency site and spent the day performing "heavy manual labor . . . continuous[ly], except for intermittent periods when the workers were required to step out of the way of the heavy equipment." Id. Moreover, instead of leaving at 3:30 p.m., the employee was forced to work through the night and finally left the site after 9:00 a.m. the following morning. Id. at 565. The employee complained that he was tired several times throughout the evening and was only allowed to leave the next morning when he told his supervisor that he was too exhausted to continue working. Id. The Robertson court found that there was a genuine issue of material fact concerning whether there was "a foreseeable risk of harm which the employer had a duty to guard against." Id. at 569.

In both Faverty and Robertson, the accidents were caused by the employee's fatigue, and the courts found that there was a foreseeable risk of harm during the employee's drive home. In the instant case, however, the plaintiffs have failed to offer any evidence that the accident was caused by Aseron's fatigue. In fact, Aseron testified that she was not tired and did not have any problems concentrating during the ride home. Aseron Dep. at 86-87. Moreover, the plaintiffs have not offered any evidence that Aseron appeared tired or complained that she was fatigued. The only evidence the plaintiffs offer in support of their claim against Nordstrom's is that Aseron worked twelve hours before driving home,

and that Aseron normally worked ten hour days. Pls.' Resp. at 5 (citing Aseron Dep. at 37); Aseron Dep. at 90. Even if Faverty and Robertson controlled this Court's decision, the fact that Aseron worked two extra hours on the day of the accident fails to create a genuine issue of material fact concerning whether there was "a foreseeable risk of harm which the employer had a duty to guard against." Robertson, 301 S.E.2d at 569. Accordingly, the plaintiffs' claim against Nordstrom fails.

Furthermore, the Superior Court of Pennsylvania denied recovery in a somewhat analogous case against a tortfeasor's employer in Hill v. Acme Mkts., Inc., 504 A.2d 324 (Pa. Super. Ct. 1986). In Hill, a veteran employee collided with and killed the operator of another car while on the way home from work. Id. at 324. On the day of the accident, the employee,

who had previously suffered from acute paranoid breakdown or a toxic drug psychosis, lapsed into a "fearful mental state" caused by his job activity. As a result of this mental state, it is pleaded that [the employee] left the store, got into his automobile, and left the premises. It is alleged that he drove recklessly and at an excessive rate of speed and subsequently became involved in a collision with [the] decedent's vehicle.

Id. The decedent's estate brought suit against the employee and the employer.

The decedent's estate claimed that the employer "was negligent in failing to learn of the [employee's] 'disorders' and to remove him from the position of cashier," so that he would not "become

emotionally upset, leave the premises, drive his car in a negligent manner and become involved in a collision." Id. at 325. The court found that the plaintiff established the requisite "but-for causality," id., but the court explained that the proximate cause analysis required more than this causal connection. The court stated that:

Proximate cause generally denotes more than mere causation-in-fact and serves as a means by which courts are able to place practical limits on liability as a matter of policy. Wisniewski v. Great Atlantic and Pacific Tea Co., 226 Pa. Super. 574, 323 A.2d 744 (1974). See also Takach v. B.M. Root Co., 279 Pa. Super. 167, 420 A.2d 1084 (1980); Ford v. Jeffries, 474 Pa. 588, 379 A.2d 111 (1977). Proximate cause is designed not only to allow recovery for damages incurred because of another's act, but also to define such limits on recovery as are economically and socially desirable. See Whitner v. Von Hintz, 437 Pa. 448, 263 A.2d 889 (1970); Klages v. General Ordnance Equipment Corp., 240 Pa. Super. 356, 367 A.2d 304 (1976). See also Restatement (Second) of Torts §§ 430, 431, 433, 434.

Applying these standards, we conclude that the allegations in the complaint do not set forth a cause of action against appellee To hold otherwise would, we believe, fix an impossible burden on an employer to constantly monitor each employee's mental state and assume a risk of non-detection which would unfairly fix upon him responsibility for employee's negligence totally unrelated to his employment.

Hill, 504 A.2d at 325-26.

In the instant action, the plaintiffs have failed to offer proof to establish the requisite linkage of but-for causality. More specifically, the plaintiffs have not shown that Aseron's

fatigue was a cause of the accident. As explained above, Aseron testified that she was not tired after leaving work and that she did not have any problem concentrating while driving home. Aseron Dep. at 86-87.

Moreover, even if the plaintiffs offered evidence that Aseron had been tired, that weariness caused the accident, and that Nordstrom knew or should have known that Aseron was fatigued, this Court would still be required to grant Nordstrom's motion. Imposing liability on an employer whose employee caused an accident while weary from an extra two hours of work would "fix an impossible burden on an employer to constantly monitor each employee's [fatigue] and assume a risk of non-detection which would unfairly fix upon him responsibility for employee's negligence totally unrelated to his employment." Hill, 504 A.2d at 325-26. Pennsylvania courts have not extended liability to employers in this scenario, and this Court declines the plaintiffs' invitation to do so here. Accordingly, the Court grants the defendant's Motion.

An appropriate Order follows.

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O R D E R

AND NOW, this 13th day of August, 1998, upon consideration of Motion by Defendant Nordstrom, Inc. for Summary Judgment (Docket No. 12), IT IS HEREBY ORDERED that the defendant's Motion is **GRANTED**.

IT IS FURTHER ORDERED that all claims against defendant Nordstrom, Inc. are **DISMISSED WITH PREJUDICE**.

BY THE COURT:

HERBERT J. HUTTON, J.