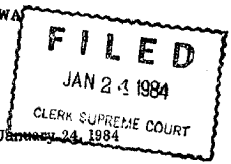
IN THE COURT OF APPEALS OF IOWA



Filed January 24, 1984

199

UNITED FIRE AND CASUALTY CO.,)
Insurance Carrier, and
ROGER & DONNA HOWE,)

Plaintiffs-Appellants,)

vs.)

CONTRX INDUSTRIES, INC.)

Defendant-Appellee.)

3-322
83-347

Appeal from Polk District Court - J. P. Denato, Judge.

Plaintiffs appeal from a judgment for defendant. AFFIRMED.

Timothy McCarthy, Des Moines, Iowa, for plaintiffs-appellants.

Michael R. Hoffmann and Joseph Cortese, II, Jones, Hoffman & Davison, Des Moines, Iowa, for defendant-appellee.

Considered by Oxberger, C.J., and Donielson, and Sackett, JJ.

SACKETT, J.

Plaintiffs appeal from a judgment for defendant. We affirm.

Roger and Donna Howe were the owners of the Hawkeye Motel in Des Moines. In the early morning hours of February 12, 1981, the motel was damaged by fire. United Fire & Casualty Co. carried the insurance on the motel. It appears to be undisputed that the fire was started by a cigarette smoked by Kenneth Vogelbaugh. Vogelbaugh was employed by Contrx Industries, the defendant, as a salesman, and was in Des Moines calling on various customers. Vogelbaugh was in Des Moines under the direction of his employer and had the use of a company car. The employer paid all of Vogelbaugh's travel expenses. Vogelbaugh had originally intended to leave Des Moines on the morning of February 11. Because of the weather conditions, however, Vogelbaugh was instructed by his supervisor to stay another night and to call on additional customers the following day. Vogelbaugh then checked into the Hawkeye Motel. He had dinner and then met a friend at a bar. His visit at the bar was purely a social visit. Vogelbaugh returned to his motel room at approximately 1:00 a.m. He fell asleep while lying on the bed smoking a cigarette and awakened to find the bed covers on fire. The fire apparently gutted the room in which Vogelbaugh had been staying. The total damages, including lost profits, were asserted by plaintiffs to be $39,500.59.

The case was submitted to the court on stipulated facts. The court held that Vogelbaugh was not acting within the scope of his employment when he negligently started the fire and that defendant therefore was not required, under a respondeat superior theory, to reimburse plaintiffs for their loss. This appeal followed.

On appeal the plaintiffs allege that the trial court erred in finding that the defendant's employee was not acting within the scope of his employment when he negligently caused the fire at plaintiffs' motel.

I.

In this case, which was tried to the court on stipulated facts, the trial court found as a matter of fact that the employee's negligent conduct was not within the scope of his employment. Because this is a law action tried to the court it is reviewed for correction of errors at law. Iowa R. App. P. 4. The court's findings of fact have the force of a special verdict and are binding on us if supported by substantial evidence. Iowa R. App. P. 14 (f)(1). We view the evidence in the light most consistent with the judgment. Our deference to the trial court's finding of facts does not extend to its determinations of law. R.E.T. Corp. v. Frank Paxton Co., Inc., 329 N.W. 2d 416, 419 (Iowa 1983).

II.

For an employer to be held liable, under a respondeat superior theory, to injured third parties for the negligent conduct of an employee, the employee's negligent act must have been committed within the scope of his employment. Sandman v. Hagan, 261 Iowa 560, 566, 154 N.W. 2d 113, 117 (1968). An act is within the scope of one's employment where such act is necessary to accomplish the purpose of the employment and is intended for such purpose, although in excess of the powers actually conferred on the employee by the employer. Id. at 566-67, 154 N.W. 2d at 117. Furthermore, a deviation from the employer's business or interest to pursue the employee's own business or interest must be substantial in nature to relieve the employer from liability. Id. at 568, 154 N.W. 2d at 118.

The supreme court in Seybold v. Eisle, 154 Iowa 128, 134, 134 N.W. 578, 581 (1912) (quoting Wood on Master & Servant, 1st ed. p. 585) said:

> The simple test is whether they were acts within the scope of his employment—not whether they were done while prosecuting the master's business; but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him.

While the Iowa cases cited by the parties in support of their respective arguments adequately set forth the relevant law, we have found no Iowa cases involving a similar fact situation. A Pennsylvania federal district court case, however, presented a somewhat similar situation. See Minamayor Corp. v. Paper Mill Suppliers, Inc., 297 F. Supp. 524 (E.D. Pa. 1969). In Minamayor a motel owner sought to recover damages from defendant corporation for loss caused by a fire started by defendant's employee, a traveling salesman. The employee's travel expenses were paid by his employer. He had no fixed working hours, but was expected to be "on call" at all times. The employee apparently caused a fire in the motel room in which he was staying after arising in the morning and before undertaking any duties on behalf of the employer. The district court granted defendant employer's motion for summary judgment, stating:

> [E]ven if it be assumed that he negligently or deliberately started the fire, such conduct could not have been within the scope of or furtherance of his employment.

Id. at 526. The court concluded:

> It is obvious that [the employee's] conduct in rising, shaving and apparently lighting a cigarette were neither acts within the scope of his employment or negligent conduct during the course thereof. That employers are responsible for all acts of their salesmen while on the road without regard to whether such acts are related in any way to the employer's business is, if the folklore surrounding the conduct of travelling salesmen has any basis in fact, a frightening contemplation.
>
> Id.

In Edgewater Motels, Inc. v. Gatzke, 277 N.W. 2d 11 (Minn. 1979), an employee negligently caused a fire in plaintiff's motel. The employee was supervising the opening of a new restaurant and was staying at plaintiffs' motel at defendant's expense. The employee remained "on call" 24 hours per day. On August 23, 1977, the employee worked on the restaurant premises for about seventeen hours. The employee left the restaurant in a company car and returned

to the motel. He and a fellow employee walked across the street to have a drink while discussing the newly opened restaurant. The employee returned to his motel room approximately one hour later. He sat down at a desk to fill out his expense account forms and smoked a cigarette. The employee went to bed and soon thereafter a fire broke out. The fire probably started in a wastebasket and was caused by a burning cigarette or match. The case was tried to a jury, which found that the employee's negligent act occurred within the scope of his employment. The trial court then set aside the jury's finding, granting the defendant employer's motion for judgment notwithstanding the verdict, ruling that the employee's negligence did not occur within the scope of his employment. The Minnesota Supreme Court, on appeal, found that smoking can be an act within an employee's scope of employment. The court reasoned:

> It seems only logical to conclude that an employee does not abandon his employment as a matter of law while temporarily acting for his personal comfort when such activities involve only slight deviations from work that are reasonable under the circumstances, such as eating, drinking, or smoking.

Id. at 16. The court in Edgewater found that "an employer can be held vicariously liable for his employee's negligent smoking of a cigarette [if] he was otherwise acting in the scope of his employment at the time of the negligent act." Id. The court went on to hold that it was reasonable for the jury to find that the employee was acting within the scope of his employment when he completed his expense account paperwork and, accordingly, the court reinstated the jury's determination that the employee was acting within the scope of his employment.

As we noted above, the trial court's findings of fact are binding on us if supported by substantial evidence. We find, after reviewing the evidence considered by the trial court, that there was substantial evidence to support the court's finding, as a trier of fact, that Vogelbaugh's negligent act did not occur within the scope of his employment. While the act of smoking a cigarette does

not amount to an "abandonment of employment" as a matter of law, there is no evidence in this case that Vogelbaugh was undertaking any activities connected with his job at the time the negligent act was committed. Because the trial court's findings of fact are supported by substantial evidence, we are bound by them.

III.

The plaintiff urges on appeal that this court borrow from workers' compensation law and apply a "dual purpose" test. That test, as set forth by Judge Cardozo, is this:

> If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own.

Marks' Dependents v. Gray, 251 N.Y. 90, 167 N.E. 181 (1929). We note, with respect to this argument, the trial court's finding that "[b]oth counsel agree at argument that the scope of employment for WC [workers' compensation] purposes is different than for vicarious liability, as here." It appears, therefore, as though the plaintiff waived this issue at trial. Assuming, arguendo, that the issue was not waived, we find that it lacks merit. Plaintiff offers no persuasive authority for our application of this more lenient test to cases involving respondeat superior liability. We refuse to adopt the "dual purpose" test proposed by plaintiff for the purpose of determining an employer's liability to third persons for the negligence of an employee. See Robarge v. Bechtel Power Corp., 131 Ariz. 280, 640 P. 2d 211 (1982) (rejecting plaintiff's argument that workmen's compensation law be applied in respondeat superior case).

We find no errors in the proceedings below. We therefore affirm the judgment of the trial court.

AFFIRMED.