SJC-13089

RUSSELL BERRY vs. COMMERCE INSURANCE COMPANY.

Bristol. September 8, 2021. - October 25, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Massachusetts Tort Claims Act. Police, Injury on duty, Training program. Public Employment, Police. Municipal Corporations, Police. Agency, Scope of authority or employment.

Civil action commenced in the Superior Court Department on November 7, 2018.

The case was heard by Raffi N. Yessayan, J., on motions for summary judgment.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Mark C. Darling for the defendant.
Claudine A. Cloutier for the plaintiff.

WENDLANDT, J. This case concerns the question whether a police officer, who was a certified firearms training instructor, was acting "within the scope of his office or

employment" under the Massachusetts Tort Claims Act (act), G. L. c. 258, § 2, when his personal vehicle struck and seriously injured a fellow officer during a paid lunch break following the morning session of a day-long, mandatory firearms training held on town-owned property. The tortfeasor, who acknowledged that he had been driving too fast when he approached the range in his vehicle on his way back from purchasing lunch, stopped the vehicle momentarily; he then accelerated, spinning rocks and gravel, before heading toward a picnic table where the victim was sitting. Applying the brakes, he caused the vehicle to slide and, ultimately, to strike the victim. Although the injured officer was found to have been injured "in the performance of his duty" for purposes of receiving compensation under G. L. c. 41, § 111F, we conclude that the conduct of the officer who struck him, which involved unsafe and, at the least, grossly negligent driving with no motivation to benefit his employer, did not fall within the scope of his employment under common-law principles of vicarious liability, respondeat superior, and agency. Accordingly, the immunity provision of the act provides no defense to the tortfeasor's automobile insurer, the defendant Commerce Insurance Company (Commerce).

1. Background. The following facts are drawn from the parties' consolidated statement of material facts and are either not in dispute or viewed in the light most favorable to

Commerce, the party against which summary judgment entered. See Attorney Gen. v. Bailey, 386 Mass. 367, 371 (1982).

The incident occurred on June 12, 2017, at a firing range on property owned by the town of Raynham. At the time of the incident, Officer Shawn Sheehan was a fourteen-year veteran of the Raynham police department, and also a certified firearms instructor, as he had been for approximately seven years. Maintaining that certification was a job requirement.

That morning, Sheehan and a fellow officer met at the police station to collect rifles and ammunition necessary for the day's training. Sheehan placed the equipment in his pickup truck and drove to the firing range, approximately three and one-half miles away. Sheehan was being paid eight hours of overtime to conduct the training. When they reached the range, the officers assembled tents over picnic tables at the end of the range, near a storage container that held other training equipment, such as targets and warning flags.

The plaintiff, Officer Russell Berry of the Raynham police department, attended the mandatory, day-long training, as all officers were required to do annually. He was paid eight hours of overtime to attend. During the training, officers did not wear their uniforms, although those being trained wore duty belts to hold their pistols. The officers at the training were "on duty" but did not expect to leave the training to respond to

calls other than for a "large-scale emergency," if one were to occur. For that reason, Sheehan testified at his deposition, the officers had a portable police radio at the range.

After the morning training session, the officers broke for a paid lunch break. Some officers left the range to get sandwiches for the group that stayed behind. Sheehan also left the range to buy lunch at a nearby store. He drove his pickup truck, which was insured by Commerce. While Sheehan retained ultimate responsibility for the security of the rifles and ammunition being used in the training, he delegated oversight of these items to the officers who remained at the range. Sheehan testified that the lunch was a "working lunch" during which officers would engage in further discussion about firearms, and that he remained "on the clock" during the lunch break.

When Sheehan returned approximately ten minutes after leaving, Berry, who had remained at the range, was seated at one of the picnic tables; the tables were located on the range side of the storage container opposite the parking lot, and away from the access road. Sheehan drove his truck directly onto the range, intending to park toward the back of the container where other officers sometimes parked rather than in the parking lot. Sheehan testified that, as he pulled into the range, he drove "faster than [he] should have," coming in "a little hot, spinning the rear tires." He acknowledged that he "stopped, and

then sped up, spinning rocks or gravel" and heading toward the picnic table, where Berry sat. Sheehan applied the brakes, and the truck slid and struck Berry, pinning his leg between the truck and the picnic table. For his misconduct, Sheehan was suspended for five days without pay.

Berry sustained severe injuries to his leg and incurred medical bills in excess of $130,000. As a result of his injuries, Berry received leave with pay under the statutory analogue to the workers' compensation act, G. L. c. 152, for police officers and firefighters injured "in the performance of [their] duty," G. L. c. 41, § 111F. See Corbett v. Related Cos. Northeast, 424 Mass. 714, 719-720 (1997).

Berry submitted a written demand letter to Commerce, claiming that Sheehan's liability was clear and that Commerce, as Sheehan's automobile insurer, was responsible for payments to cover Berry's damages. Commerce denied coverage on the ground that Sheehan was a public employee who had been acting "within the scope of his . . . employment" at the time of the accident and, thus, was immune from tort liability under G. L. c. 258, § 2.[1] Berry then commenced the present action against Commerce

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[1] General Laws c. 258, § 2, provides, in relevant part:

> "Public employers shall be liable for . . . personal injury . . . caused by the negligent or wrongful act or omission of any public employee while acting within the

in the Superior Court seeking a judgment declaring that Sheehan was not immune under the act. See G. L. c. 231A, § 1. On cross motions for summary judgment, a Superior Court judge entered judgment in favor of Berry, after concluding that Commerce, as Sheehan's insurer, was liable for Berry's injuries because Sheehan was not acting within the scope of his employment at the time of the accident.

2. Discussion. Summary judgment is appropriate where there is no material issue of fact in dispute, and the moving party is entitled to judgment as a matter of law. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991); Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). Our review of a decision on a motion for summary judgment is de novo. Federal Nat'l Mtge. Ass'n v. Hendricks, 463 Mass. 635, 637 (2012). When parties have filed cross motions for summary judgment, "we view the evidence in the light most favorable to

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scope of his [or her] office or employment, in the same manner and to the same extent as a private individual under like circumstances . . . . The remedies provided by this chapter shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer or, the public employee or his [or her] estate whose negligent or wrongful act or omission gave rise to such claim, and no such public employee or the estate of such public employee shall be liable for any . . . personal injury . . . caused by his [or her] negligent or wrongful act or omission while acting within the scope of his [or her] office or employment" (emphasis added).

the party against whom summary judgment was entered." Conservation Comm'n of Norton v. Pesa, 488 Mass. 325, 330 (2021), citing Miramar Park Ass'n, Inc. v. Dennis, 480 Mass. 366, 377 (2018).

Pursuant to the act, public employees who commit negligent or wrongful acts or omissions "while acting within the scope of [their] office or employment" are immune from liability.[2] G. L. c. 258, § 2. In interpreting this phrase, we apply the common-law test, which is based on principles of vicarious liability, respondeat superior, and agency,[3] and which "considers whether

[2] The judge characterized Sheehan's conduct as "horseplay." As Commerce maintains, the immunity provision of the act covers grossly negligent conduct so long as the conduct occurred within the scope of employment. See Monahan v. Methuen, 408 Mass. 381, 392 (1990) (public employees "are immune from personal liability for their allegedly grossly negligent conduct"). The act does not provide immunity to public employees for intentional torts. See G. L. c. 258, § 10 (c).

[3] These three concepts are interrelated. Vicarious liability is the "imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons." Black's Law Dictionary 1084 (6th ed. abridged, 1991). Respondeat superior is a type of vicarious liability in which the employer is held liable for the acts of the employee committed within the scope of employment. 1 S.M. Speiser, C.F. Krause, & A.W. Gans, American Law of Torts § 4:3 (2021). Respondeat superior arises from the agency relationship between an employee and an employer; the employee (or agent) acts on behalf of the employer (or principal), who is presumed to have the authority to control the agent's actions. See Restatement (Third) of Agency §§ 1.01 & comment b, 2.04 comment b (2006) ("Functionally tied though the doctrine is to tort law, [respondeat superior] has long been classified as an element of agency doctrine").

the act was in furtherance of the employer's work." Clickner v. Lowell, 422 Mass. 539, 542 (1996). See Burroughs v. Commonwealth, 423 Mass. 874, 877 (1996), quoting Kansallis Fin. Ltd. v. Fern, 421 Mass. 659, 666 (1996) ("The scope of employment test asks the question: is this the kind of thing that in a general way employees of this kind do in employment of this kind").

Commerce is correct that an act may be within the scope of employment even though it is tortious. See Restatement (Third) of Agency § 7.07 (2006). See also Pinshaw v. Metropolitan Dist. Comm'n, 402 Mass. 687, 695 (1988), quoting Kent v. Bradley, 480 S.W.2d 55, 57 (Tex. Civ. App. 1972) ("If the act complained of was within the scope of the servant's authority, the master will be liable, although it constituted an abuse or excess of the authority conferred. The master . . . is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury on a third person").

Still, not all tortious conduct committed by an employee in connection with his or her work is within the scope of that employee's employment. See Lev v. Beverly Enters.-Mass., Inc., 457 Mass. 234, 239 (2010) (nursing home chef was not acting

within scope of his employment where he drove home intoxicated from work meeting during which he consumed alcohol and then caused accident); Clickner, 422 Mass. at 543-544 (officer who became intoxicated during golf outing was not acting within scope of employment even though he was answering work-related telephone call at time he crashed town-owned vehicle into plaintiffs). See also Merlonghi v. United States, 620 F.3d 50, 56 (1st Cir. 2010) (computer forensics specialist employed to aid in criminal investigations acted in furtherance of his own agenda and not within scope of employment when, on his way home from work, he engaged in car chase, unholstered his gun, made threatening gestures, and drove in dangerous manner, striking motorcyclist with government-owned vehicle issued to specialist to permit him to respond efficiently to emergencies). Compare McIntyre v. United States, 545 F.3d 27, 40-42 (1st Cir. 2008) (Federal agent's deliberate leak to two organized crime informants that victim also was cooperating with authorities, although criminal act and in violation of agency policy, was within scope of employment, as it was at least partially motivated to benefit agency by maintaining relationship with organized crime figures); Wang Labs., Inc. v. Business Incentives, Inc., 398 Mass. 854, 860-861 (1986) (employee's bad faith and willful interference with contractual relations,

motivated by self-interest, fell within scope of employment where intent was, at least in part, to serve employer).

Regardless of whether the act resulting in injury is tortious, we determine whether it falls within the scope of the employee's employment by considering three factors, each of which must be met to sustain the conclusion that the employee's conduct fell within the scope of the employment: (1) "whether the conduct in question is of the kind the employee is hired to perform"; (2) "whether it occurs within authorized time and space limits"; and (3) "whether it is motivated, at least in part, by a purpose to serve the employer." Clickner, 422 Mass. at 542. See Wang Labs., Inc., 398 Mass. at 859-860 (acknowledging that, although two factors favored finding that employee's conduct occurred within scope of employment, third factor must also be met to sustain that conclusion). See also Pinshaw, 402 Mass. at 694-695 (noting that "[t]he issue is [the employee's] motivation" after concluding that other factors were satisfied); Restatement (Second) of Agency § 228(2) (1958) ("Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master").

Here, only the second factor -- whether the conduct occurred within authorized time and space limits -- clearly

favors Commerce. Specifically, the accident occurred at the firing range on town-owned property, during a paid lunch break following the morning session of a day-long mandatory firearms training in which Sheehan, a certified firearms instructor, participated as part of his position with the Raynham police department.[4]

The circumstances concerning the first factor -- whether the conduct in question was of the kind the employee is hired to perform -- are mixed. On the one hand, viewed in the context of the entire day, Sheehan was conducting mandatory firearms training as part of his employment with the police department. See Clickner, 422 Mass. at 542 (reviewing employee's course of conduct during entire day in evaluating whether conduct was kind he was hired to perform); Wang Labs., Inc., 398 Mass. at 860 (reviewing employee's employment responsibilities generally in connection with first factor). All officers, including Berry, were mandated to attend such training annually. Both Sheehan and Berry were being paid overtime to be at the range, were on

[4] Contrary to Commerce's contention, this case does not involve the "going and coming" rule or any exceptions thereto. That rule provides that injuries sustained by an employee traveling to or from work do not occur within the course of employment. Lev v. Beverly Enters.-Mass., Inc., 457 Mass. 234, 238 (2010), citing Mosko v. Raytheon Co., 416 Mass. 395, 399 (1993). Here, the conduct at issue occurred when Sheehan was on town property at the range, rather than when he was traveling to or from the range.

town-owned property, and were using police department equipment. Even the time spent leaving the range to buy lunch was paid time, and a permitted part of the training day. Further, Sheehan testified that the lunch was a "working lunch" during which officers would receive informal instruction and take turns setting up and preparing for the afternoon session. Sheehan also retained the ultimate responsibility (albeit one that he delegated to fellow officers during the ten minutes he was away from the range to get lunch) for oversight of the equipment.

On the other hand, Sheehan's conduct -- approaching the range too fast in his truck, stopping, then proceeding toward Berry, spinning his tires in the gravel, and braking and causing his truck to slide into Berry -- was not part of the duties that Sheehan, as a firearms instructor, was hired to perform, and there is nothing in the record to suggest that his employer approved or ordered the conduct. See Merlonghi, 620 F.3d at 57 ("Clearly, [the employee] was not employed to create confrontational altercations with private citizens while driving home from work"); Burroughs, 423 Mass. at 877-878 (National Guard member was not engaged in kind of conduct he was employed to perform while bartending because activity was "neither explicitly nor implicitly ordered or even requested by his supervisors").

Regardless of the determination as to the first factor, consideration of the third factor -- whether the conduct was motivated, at least in part, by a purpose to serve the employer -- compels the conclusion that Sheehan was not acting within the scope of his employment. His unsafe driving was not motivated, even in part, by a purpose to serve his employer. As Sheehan acknowledges, nothing in the dangerous game[5] of driving fast toward the picnic table, behind the storage container where officers were present, slamming on his brakes, and skidding toward the officers furthered the interests of the town. See Restatement (Second) of Agency § 235 comment c ("The fact that an act is done in an outrageous or abnormal manner has value in indicating that the servant is not actuated by an intent to perform the employer's business"). See also Commonwealth v. Jerez, 390 Mass. 456, 462 (1983) (collecting cases where employee's tortious conduct was within scope of employment, i.e., it was in response to interference with employee's ability to perform work functions); Levi v. Brooks, 121 Mass. 501, 505 (1877) ("The test of the liability of the master is, that the act of the servant is done in the course of doing the master's work, and for the purpose of accomplishing it"). See, e.g.,

[5] Berry testified that Sheehan had engaged in similar conduct earlier in the day, that time without any injuries. For purposes of summary judgment, we do not rely on Berry's testimony.

Clickner, 422 Mass. at 544 (officer who used town-owned vehicle to drive from day-long golf outing where he became intoxicated was not acting in furtherance of employment even though he was answering work-related telephone call at time he crashed vehicle into plaintiffs).[6] The egregious nature of Sheehan's misconduct had no employment-based purpose, taking what otherwise might have been a close case and firmly placing it outside the realm of the immunity of the act.

Commerce contends that a determination that Sheehan was not acting "within the scope of his employment" for purposes of the act, see G. L. c. 258, § 2, cannot be reconciled with the determination that Berry was injured "in the performance of his

[6] By contrast, we have held that an employee's tort committed, at least in part, to further the employer's interest falls within the scope of employment. See Orasz v. Colonial Tavern, Inc., 362 Mass. 881, 881 (1972) (assault on patron by employee was committed "to maintain order and decorum," which ultimately was "for the purpose of accomplishing the work of the defendant"); Suckney v. Bert P. Williams, Inc., 355 Mass. 62, 64 (1968) (finding that battery was in response to picket demonstration, which interfered with employee's ability to deliver beer he was transporting); Hobart v. Cavanaugh, 353 Mass. 51, 53 (1967) (battery was in response to employee's frustration with victim's delay in putting gasoline in his truck, impeding his ability to meet employer's deadline demands); Thompson v. Beliauskas, 341 Mass. 95, 98 (1960) (forcible ejection of patron who refused to leave café was within scope of employment because employee was acting under instructions of employer).

duty" under G. L. c. 41, § 111F.[7] Commerce urges us to apply the same standard to the act as is applied to G. L. c. 41, § 111F, and the workers' compensation statute, G. L. c. 152, § 26.[8] We repeatedly have declined to do so. See, e.g., Lev, 457 Mass. at 239 n.6 ("tort liability under the doctrine of respondeat superior is viewed differently from an injured employee's entitlement to benefits under the workers' compensation act"); Clickner, 422 Mass. at 543 n.4 (differentiating between "worker's compensation analysis" and "imputed tort liability under respondeat superior principles" in case interpreting act). In doing so, we have acknowledged that the test used in workers' compensation cases "is much broader than the 'scope of employment' test applied to determine whether a master is liable for a servant's negligent acts." Fredette v. Simpson, 440 Mass. 263, 266 (2003). See Mulford v. Mangano, 418 Mass. 407, 410 (1994) (rejecting narrow "scope of employment" test used in tort

[7] Berry's eligibility for leave without loss of pay is not before us.

[8] The wording of G. L. c. 41, § 111F ("in the performance of his [or her] duty"), and the workers' compensation act, G. L. c. 152, § 26 ("arising out of and in the course of his [or her] employment") are comparable. See Wormstead v. Town Manager of Saugus, 366 Mass. 659, 663 (1975).

cases in favor of broader standard used in workers' compensation cases).[9]

The different treatment is grounded, at a minimum, in the different purposes of the statutes. Like the workers' compensation statute, G. L. c. 41, § 111F, aims "to prevent any deprivation of pay, either in time or value, during the period of an officer's incapacity. The provision reflects an intention that an incapacitated officer receive leave 'without loss' of ordinary compensation." Todino v. Wellfleet, 448 Mass. 234, 237 (2007), quoting id. Liability for workers' compensation benefits has been broadly construed against the employer to aid the injured employee. See, e.g., Roberge's Case, 330 Mass. 506, 509 (1953).

The purpose of the act is different; the act creates "a comprehensive and uniform regime of tort liability for public employers," Lafayette Place Assocs. v. Boston Redev. Auth., 427 Mass. 509, 534 (1998), and places public employers in the same position as private employers vis-à-vis their liability for the conduct of their employees, making apt the application of traditional principles of vicarious liability, respondeat

[9] For this reason, Commerce's reliance on Wormstead, 366 Mass. at 662-663, which addressed the question whether G. L. c. 41, § 111F, applied to an officer who was injured while driving back to the police station following a paid lunch break, is misplaced.

superior, and agency, see G. L. c. 258, § 2 ("Public employers shall be liable for . . . personal injury . . . caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his [or her] office or employment, in the same manner and to the same extent as a private individual under like circumstances"). Commerce has provided no persuasive argument to deviate from the established approach of using separate analyses for claims under the act and workers' compensation claims.

Judgment affirmed.