Superior Court
of the
State of Delaware

Jan R. Jurden
Judge

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Submitted: December 8, 2006
Decided: March 2, 2007

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RE: Lovett v. Chenney, C.A. No. 05C-12-006
Upon Defendants' Motion for Summary Judgment – **GRANTED**

Dear Counsel:

Before the Court is the motion for summary judgment of Defendants, Andrew Chenney and Matt Slap Subaru, Inc. ("Moving Defendants"). Moving Defendants argue that Plaintiffs, William Lovett, Carol Lovett, and the Estate of Christopher Lovett, cannot maintain a tort action against them, because Plaintiffs' remedies are limited to the Workers Compensation Act.[1] For the reasons set forth below, the Court

[1] 19 *Del. C.* § 2304.

finds that there are no genuine issues of material fact to dispute that Christopher Lovett and Andrew Chenney were acting within the course and scope of their employment with Matt Slap Subaru, Inc. ("Matt Slap") at the time of the accident. Therefore, Moving Defendants' motion for summary judgment is **GRANTED.**

FACTS

On December 19, 2003, at approximately 4:30 p.m., Christopher Lovett was the front-seat passenger in a vehicle operated by Defendant, Andrew Chenney. At the time of the accident, both Lovett and Chenney were employed by Matt Slap as automobile technicians. Chenney was operating a 1997 Saturn station wagon owned by Matt Slap on Old Paper Mill Road, when he lost control of the vehicle. The vehicle went up an embankment and struck a utility pole. Lovett suffered massive head injuries and died later that evening at Christiana Hospital.

The parties agree that Lovett and Chenney were required to road test vehicles as part of their employment with Matt Slap. The parties dispute, however, whether Lovett and Chenney were performing a road test of the Saturn station wagon at the time of the accident. Plaintiffs claim that there are unresolved issues regarding the accident that may be revealed through discovery, including the possibility that, at the time of the accident, Lovett and Chenney may have been returning from a co-worker's residence. In that case, Plaintiffs argue that Lovett and Chenney's actions

were not authorized by Matt Slap and would fall outside of the ordinary course and scope of their employment. Although Moving Defendants acknowledge that Lovett and Chenney were not on the normal road test route used by Matt Slap employees, they maintain that the accident occurred while Lovett and Chenney were performing a safety check of the 1997 Saturn station wagon.[2] Moving Defendants argue that Old Paper Mill Road is within a reasonable proximity of the normal test route.[3]

PROCEDURAL HISTORY

Plaintiffs filed suit against the Moving Defendants and Defendant, Donald M. Durkin Contracting, Inc. ("Durkin"), on December 1, 2005. Plaintiffs asserted causes of action for wrongful death and a survival action against all Defendants. Plaintiffs' claims against Chenney are for his negligent operation of the vehicle, and the claims against Matt Slap are based on the doctrine of *respondeat superior*. Plaintiffs alleged that Durkin, who contracted with the City of Newark to construct a reservoir adjacent to Old Paper Mill Road, created a hazard to motorists by allowing groundwater to flow onto the roadway. Durkin asserted cross-claims for indemnification and contribution against Chenney and Matt Slap.

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[2] Aff. John Pharis, E-File 11782330, Ex. B., ¶ 3, 4.

[3] *Id.* at ¶ 4.

In the present motion, Moving Defendants argue that Lovett is statutorily barred from bringing a civil action against Chenney and Matt Slap, because he was acting within the course and scope of his employment at the time of the accident. Because Lovett's sole remedy lies with the Workers Compensation Act, Moving Defendants argue that Plaintiffs cannot maintain their derivative wrongful death claim, and Durkin cannot seek indemnification and contribution from Moving Defendants. Durkin did not file a response to Moving Defendant's motion.

STANDARD OF REVIEW

The Court may grant summary judgment if it determines that there are no genuine issues of material fact, and the moving party is entitled to a judgment as a matter of law.[4] When considering a motion for summary judgment, the Court must view all of the facts in a light most favorable to the non-moving party.[5] The burden of proof is initially borne by the moving party.[6] However, if a movant makes such a showing, "the burden shifts to a non-moving party to demonstrate that there are material issues of fact."[7] In formulating its decision, the Court may only consider

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[4] *Pullman, Inc. v. Phoenix Steel Corp.*, 304 A.2d 334, 335 (Del. Super. 1973)(*citing Matas v. Green*, 171 A.2d 916 (Del.Super.1961); Super. Ct. Civ. R. 56(c)).

[5] *Cirka v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 2004 WL 1813283, at *3 (Del. Ch.)(*citing Williams v. Geier*, 671 A.2d 1368, 1375 (Del.1996)).

[6] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)(*citing Ebersole v. Lowengrub*, 180 A.2d 467 (Del. 1962)).

[7] *Id.* at 681 (*citing Hurtt v. Goleburn*, 330 A.2d 134 (Del. 1974)).

"the record presented, including all pleadings, affidavits, depositions, admissions, and answers to interrogatories, not on what evidence is 'potentially possible.'"[8]

DISCUSSION

Generally, the Delaware Workers Compensation Act is the exclusive remedy for an employee injured or killed in the course of his employment, regardless of questions of negligence.[9] An employee is also precluded from bringing a tort action against a fellow employee for a work-related injury.[10] However, an employee may bring a tort action against a third-party for injuries caused by the third-party's negligence.[11]

For an injury to be compensable under the Workers Compensation Act, the injury must have arisen out of and in the course of employment.[12] Whether an injury occurred in the course of an employee's employment is related to "the time, place and circumstances of the accident."[13] An employee is considered to be acting within the

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[8] *Dockham v. Miller*, 1997 WL 817873, at *1 (Del. Super.)(*citing Rochester v. Katalan,*320 A.2d 704, 708 (Del. 1974)).

[9] 19 *Del. C.* § 2304.

[10] *Ward v. General Motors Corp.*, 431 A.2d 1277, 1279 (Del. Super. 1981) (*citing Groves v. Marvel*, 213 A.2d 853 (Del. 1965)) ("suit may not be brought by one employee against another employee of the same employer for damages for a condition which is compensable under the Workmen's Compensation Law").

[11] *Showell v. Langston*, 2003 WL 1387142, at *3 (Del. Super.) (*citing Rock v. Del. Elec. Coop.,* 328 A.2d 449, 452 (Del. Super. 1974); 19 *Del. C.* § 2363).

[12] *Battista v. Chrysler Corp.*, 454 A.2d 286, 288 (Del. Super. 1982)(*citing* 19 *Del.C.* § 2304).

[13] *Dravo Corp. v. Strosnider*, 45 A.2d 542, 543 (Del. Super. 1945).

course and scope of his employment when he is performing activities that "an employee may reasonably do or be expected do to within a time during which he is employed, and at a place where he may reasonably be during that time."[14]

Plaintiffs argue that there are genuine issues of material fact as to whether Lovett and Chenney were acting within the course and scope of their employment with Matt Slap at the time of the accident. Plaintiffs do not support their allegations with affidavits. Instead, Plaintiffs make unsubstantiated claims that Lovett and Chenney may have been returning from a co-worker's home at the time of the accident. In contrast, Moving Defendants submitted the affidavit of John Pharis, service manager for Matt Slap, in support of their motion for summary judgment.[15] Pharis averred that one of Lovett and Chenney's job requirements was to perform safety inspections of vehicles newly acquired by Matt Slap or brought in for service. [16] Pharis also confirmed that Lovett and Chenney were road testing the 1997 Saturn SL Wagon at the time of the accident.[17]

The Court cannot rely on unsupported suppositions and scenarios that are "potentially possible." Based on the record presented, there are no genuine issues of

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[14] *Id.* at 543-544.

[15] Aff. John Pharis, E-File 11782330, Ex. B.

[16] *Id.* at ¶ 2.

[17] *Id.* at ¶ 3.

material fact to dispute that Lovett and Chenney were performing a road test as part of their employment with Matt Slap at the time of the accident. Accordingly, the sole remedy available to the Estate of Christopher Lovett, as the employee, for his personal injuries is the Workers Compensation Act.

Having determined that the Estate of Christopher Lovett cannot maintain a tort action against the Moving Defendants, it follows that Plaintiffs, William Lovett and Carol Lovett, Christopher's parents, are also precluded from asserting a wrongful death claim against Moving Defendants. A parent may bring an action for the wrongful death of a child against a party "whose wrongful act cause[d] the death."[18] A wrongful act under the statute is defined as an act "which would have entitled the party injured to maintain an action and recover damages if death had not ensued."[19] A wrongful death claim is a derivative claim, which is wholly dependent on the decedent's ability to bring a civil action.[20] Therefore, because Christopher Lovett is precluded from bringing a tort action against his employer, Matt Slap, and his co-

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[18] 10 *Del. C.* § 3722(a).

[19] 10 *Del. C.* § 3721(5). *See also Yardley v. U.S. Healthcare, Inc.*, 698 A.2d 979, 985 (Del. Super. 1996)(*citing Drake v. St. Francis Hosp.*, 560 A.2d 1059, 1062 (Del. 1989)("the Delaware Wrongful Death statute preconditions the right to recover on the decedent's ability to have maintained an action and recover damages").

[20] *Allstate Ins. v. Salem,* 2005 WL 103071, at *1 (Del. Super. 2005) (*citing Frantz v. United States,* 791 F. Supp. 445 (D. Del. 1992)). *See also Drake*, 560 A.2d at 1062 (The statute "imposes a condition precedent to the accrual of a wrongful death cause of action . . . the decedent's ability to have maintained an action and recovered damages, if death had not ensued.").

worker, Andrew Chenney, his parents are also barred from making a derivative wrongful death claim against Moving Defendants.

Finally, Moving Defendants rely on *Diamond State Telephone Co. v. University of Delaware*[21] for their assertion that Durkin cannot maintain its cross-claims for indemnification or contribution against them. Moving Defendants correctly argue that a third-party cannot seek indemnification or contribution from an employer for the work-related injuries sustained by an employee.[22] Therefore, summary judgment is entered against Durkin for its cross-claims against Moving Defendants.

CONCLUSION

For the aforementioned reasons, the motion for summary judgment of Defendants, Andrew Chenney and Matt Slap Subaru, Inc., is **GRANTED.**

IT IS SO ORDERED.

Jan R. Jurden, Judge

[21] 269 A.2d 52 (Del. 1970).

[22] *Id.* at 55-56. *See also* 10 *Del. C.* § 6302; *Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.*, 654 A.2d 403, 407 (Del. 1995)("Because the employer cannot be held liable as a joint tortfeasor, it is not obligated to provide contribution to the third party.").