STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	CIVIL DIVISION, ROOM 5
COUNTY OF MARION	)	CAUSE NO. 49D05-1803-CT-008878

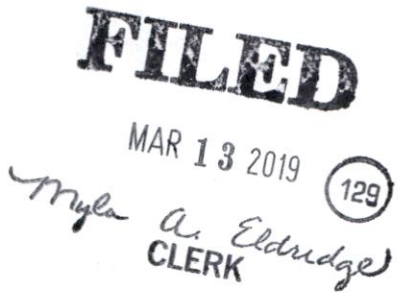
HEATH MEMMER and
KATHRYN MEMMER,

Plaintiffs,

v.

FRANK VELIKAN and
MILLER PIPELINE, LLC,

Defendants.



ORDER GRANTING DEFENDANT MILLER PIPELINE, LLC'S MOTION FOR SUMMARY JUDGMENT

This matter, having come before the Court on Defendant Miller Pipeline, LLC's Motion for Summary Judgment, and the Court, having reviewed the parties' briefings and having heard oral argument on the matter, now enters the following findings of fact and conclusions thereon:

FINDINGS OF FACT

1. Miller Pipeline, LLC is an Indiana company in the business of providing pipeline services.

2. Defendant Frank Velikan has been employed at Miller Pipeline, LLC for more than twenty years, currently holding the position of a Foreman and Welder.

3. As a foreman for Miller Pipeline, LLC, Mr. Velikan is provided with a company-owned vehicle, a Ford F350 flatbed truck that is equipped as a welding rig. Installed on the truck are a welding machine, welding box, leads, and grinders, all of which are necessary tools for the purpose of welding.

4. Miller Pipeline, LLC pays for maintenance, repairs, and gas for the welding rig, which is used solely by Mr. Velikan and which he drives to work every day.

5. In general, at Miller Pipeline, LLC, the employees who hold the title of "welder" either operate a welding truck owned by Miller Pipeline, LLC, or they own their own welding trucks and are paid mileage by Miller Pipeline, LLC.

6. Miller Pipeline, LLC has a Motor Vehicle Policy, which provides that employees who drive company-owned vehicles may use the vehicles for limited personal purposes: commuting to and from work, or for a personal errand on the way between an employee's home and work, or lunch between business stops.

7. The Motor Vehicle Policy also requires employees with company-owned vehicles to adhere to rules such as wearing a seat belt and complying with certain protocol in the event of an accident.

8. Mr. Velikan is not required to drive the welding vehicle to and from home as a condition of his employment. Evidence was presented that Mr. Velikan had the option of driving his personal vehicle to and from a Miller Pipeline, LLC facility each work day to pick up and drop off a welding truck. Miller Pipeline, LLC could also have directed that all welding trucks be left at the job site for the duration of a project, with the employees driving their personal vehicles directly to and from the job site.

9. Mr. Velikan elects to drive his Miller Pipeline, LLC vehicle between home and work each day.

10. Miller Pipeline, LLC compensates Mr. Velikan by the hour. Mr. Velikan is not compensated until he arrives at the job site for the day.

11. Miller Pipeline, LLC sets the time Mr. Velikan is to arrive at work. However, as a foreman, Mr. Velikan has discretion as to when his crew ends work for the day. He also has managerial responsibility over the work of his crew and keeps track of the hours worked by himself and his crew for payment.

12. Miller Pipeline, LLC also provides Mr. Velikan with a company cell phone. Mr. Velikan is permitted to use his company cell phone for personal purposes; however, Mr. Velikan testified that he strictly uses his Miller Pipeline, LLC cell phone for business purposes.

13. As part of his job duties, Mr. Velikan may be called to respond to an emergency after hours. However, he was not provided with a take-home vehicle for the purpose of being able to respond to such emergencies. As noted above, there was no requirement that he drive the vehicle home as part of his employment.

14. At 5:51 a.m. on September 12, 2016, Mr. Velikan left his home in Danville, Hendricks County, Indiana, to drive to work on a project site in Carmel, Hamilton County, Indiana. Mr. Velikan was operating the F350 owned by Miller Pipeline, LLC.

15. Mr. Velikan testified that he planned to use the Miller Pipeline, LLC truck in order to weld on the job site that day. However, he also testified that he always carries the same welding equipment on his truck regardless of whether welding work will be done. Additionally, Mr. Velikan transports his personal tools on the Miller Pipeline, LLC truck to and from work each day.

16. On his way to work, at 6:08 a.m., Mr. Velikan stopped to put gas in the company vehicle; he used a Miller Pipeline credit card to pay for the gas.

17. At 6:34 a.m., while still driving to work, Mr. Velikan received a three-minute phone call on his company cell phone. No evidence was presented as to the identity of the caller or the substance of the conversation, and no other phone calls were placed or received prior to the accident at issue.

18. At approximately 6:50 a.m., Mr. Velikan and Plaintiff Heath Memmer were involved in a collision near the intersection of Keystone Avenue and 96th Street in Indianapolis, Marion County, Indiana.

19. At the time of the accident, Mr. Velikan was not utilizing any equipment on his vehicle, and he was not performing any task on behalf of or at the behest of Miller Pipeline, LLC.

20. At the time of the accident, Mr. Velikan had not yet started his work day and was not being compensated.

21. Following the accident, Mr. Velikan was suspended from Miller Pipeline, LLC for one week without pay and did not receive a quarterly bonus as a consequence for the accident.

22. On March 5, 2018, Plaintiffs filed a Complaint for Damages, alleging that Mr. Velikan was negligent and negligent *per se* in the operation of his vehicle. Plaintiffs contend that Miller Pipeline, LLC, as Mr. Velikan's employer, is vicariously liable for Mr. Velikan's alleged negligence and negligence *per se*.

23. On July 12, 2018, Defendant Miller Pipeline, LLC filed a motion for summary judgment, arguing that it could not be held vicariously liable for the alleged negligence of its employee, Mr. Velikan, because Mr. Velikan was not acting within the scope of his employment at the time of his accident with Mr. Memmer. Rather, Miller Pipeline, LLC argues that the "going and coming" rule precludes its vicarious liability as a matter of law.

24. On October 29, 2018, the Plaintiffs filed a responsive brief in opposition to Miller Pipeline, LLC's motion for summary judgment, and on November 19, 2018, Miller Pipeline, LLC filed its reply. The Court heard oral argument on this matter on March 7, 2019.

CONCLUSIONS

1. The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and which can be resolved as a matter of law. Indiana Trial Rule 56(C); *Holt v. Quality Motor Sales, Inc.*, 776, N.E.2d 361, 364 (Ind. Ct. App. 2002). The burden is on the moving party to prove that there are no genuine issues of material fact and

that it is therefore entitled to judgment as a matter of law. A fact is "material" for summary judgment purposes if it helps to prove or disprove an essential element of the plaintiff's cause of action. *Weida v. Dowden*, 64 N.E.2d 742, 747 (Ind. Ct. App. 1996), *emphasis added.* A dispute about a material fact is "genuine" only if it cannot be foreclosed by reference to undisputed facts and is such that a reasonable jury could return a verdict for the non-moving party. *Id.*

2. In general, "vicarious liability will be imposed upon an employee's employer under the doctrine of *respondeat superior* where the employee has inflicted harm while acting 'within the scope of employment.'" *Barnett v. Clark*, 889 N.E.2d 281, 283 (Ind. 2008). In order for an employee's act to fall within the scope of their employment, "the injurious act must be incidental to the conduct authorized or it must, to an appreciable extent, further the employer's business." *Id.* at 284 (quoting *Celebration Fireworks, Inc. v. Smith,* 727 N.E.2d 450, 453 (Ind. 2000)).

3. In Indiana, the "common law rule . . . is that travel to and from work is not considered activity within the scope of employment so as to hold the employer liable for injury caused by an employee's negligence." *Dillman v. Great Dane Trailers*, 649 N.E.2d 665, 667 (Ind. Ct. App. 1995) (citing *Biel, Inc. v. Kirsch*, 161 N.E.2d 617, 618 (Ind. 1959)). This is known as the "going and coming" rule and is a well-recognized limitation to the doctrine of *respondeat superior*. *Dodson v. Carlson*, 14 N.E.3d 781, 783 (Ind. Ct. App. 2014).

4. The going and coming rule is applicable to cases where an employee is operating a company-owned vehicle. *Biel, Inc. v. Kirsch*, 161 N.E.2d 617, 618 (Ind. 1959).

5. The present case is appropriate for resolution as a matter of law because there are no genuine issues of material fact, and any inferences of fact do not give rise to a material dispute as to whether Mr. Velikan was acting within the scope of his employment with Miller Pipeline, LLC at the time of the accident involving Plaintiff Heath Memmer. *See Dillman v. Great Dane Trailers*, 649 N.E.2d 665, 668 (Ind. Ct. App. 1995) (noting that a fact-finder need only make a determination as to scope of employment "if there are conflicting facts, or conflicting inferences to be drawn from the facts, regarding why the motorist was on the road at the time of the accident").

6. For purposes of the going and coming rule, the critical inquiry is whether the employee was furthering the interests of his employer so as to make the trip "other than the normal and usual going to work." *Dillman v. Great Dane Trailers*, 649 N.E.2d 666, 668 (Ind. Ct. App. 1995).

7. At the time of the accident, Mr. Velikan was commuting to work. He was not being compensated by Miller Pipeline, LLC and had not yet begun his day. *See Biel, Inc. v. Kirsch*, 161 N.E.2d 617, 618 (Ind. 1959) (finding the going and coming rule applied where the employee's "employment by the corporation had not yet started for the day"). At the time of the accident, Mr. Velikan was not acting in furtherance of Miller Pipeline, LLC's business. He was not utilizing any tools on the welding truck, he was not engaging in company business on his cell phone, and he was not performing any task incidental to his

employment. Rather, his day had not yet started, and he was commuting to work. *See Dillman v. Great Dane Trailers*, 649 N.E.2d 665, 668 (Ind. Ct. App. 1994) (distinguishing situations under which an employee "is not just going to work but also performing an errand for or otherwise providing some service or benefit to the company, other than merely showing up for work"). *Cf. Gibbs v. Miller*, 283 N.E.2d 592, 595 (Ind. Ct. App. 1972) (finding an issue of fact as to scope of employment because the employee was in the middle of his work day, was engaging in tasks incidental to employment, had just received a commission for completing a sale, and was headed to do paperwork at his house).

8. It is well established that "incidental benefits" that may be derived by a company do not transform an ordinary and usual drive to work into an act within the course and scope of employment. *See Biel, Inc. v. Kirsch*, 161 N.E.2d 617, 618 (Ind. 1958). Thus, while Miller Pipeline, LLC may have received some mutual benefit from permitting its employee to drive a company vehicle between home and work, the ultimate inquiry is whether Mr. Velikan was performing an activity or service to benefit Miller Pipeline, LLC at the time of the accident, beyond simply driving to work.

9. Mr. Velikan's receipt of a phone call on his company cell phone approximately fifteen minutes before the accident with no evidence as to the substance of the phone call does not establish that Mr. Velikan was performing a work-related errand such to convert his commute to work to an act within the scope of his employment.

10. Similarly, Mr. Velikan's act of putting gas in the vehicle on the way to work, before the accident, does not support a finding that Mr. Velikan was operating within the scope of his employment. Rather, to the extent Miller Pipeline, LLC benefitted from the gas, such benefit is incidental or otherwise insufficient to thrust Mr. Velikan into the scope of his employment.

11. The welding truck operated by Mr. Velikan contained both Miller Pipeline, LLC's welding equipment and Mr. Velikan's personal tools; Mr. Velikan carried the same tools on the truck every day, regardless of whether the tools would be utilized. Miller Pipeline, LLC had other, more economical means of transporting welding equipment to job sites than providing its employees with a take-home vehicle, so any benefit Miller Pipeline, LLC derived from Mr. Velikan's transport of the equipment was incidental.

12. At the time of the accident, Mr. Velikan was not responding to an after-hours emergency in his work vehicle, and he was not provided with a take-home company vehicle for the purpose of being able to respond to emergencies. *Cf. State v. Gibbs*, 336 N.E.2d 703, 705-06 (Ind. Ct. App. 1975). In fact, Mr. Velikan was not required to drive the Miller Pipeline, LLC vehicle home; the choice to do so was solely his.

13. Plaintiffs' reliance on cases interpreting Worker's Compensation Law is misplaced. Worker's Compensation is a creature of statute and is a wholly separate legal doctrine from *respondeat* superior. Employers owe a different duty to their employees than they do to third parties, so Worker's Compensation law must be liberally construed to benefit

employees. Worker's Compensation cases do not set the standard for what constitutes "scope of employment" for purposes of vicarious liability.

14. As a matter of law, an employer is not vicariously liable for the conduct of its employee when the employee is not acting in furtherance of the employer's business or at the employer's behest. The going and coming rule is the general rule in Indiana and establishes that the simple act of commuting to work, even in a company-owned and maintained vehicle, does not fall within the scope of employment without evidence that the employee was performing an act or service to benefit the employer. Here, at the time of the accident, Mr. Velikan was driving to work just as he did every other day, and Miller Pipeline, LLC is not vicariously liable for Mr. Velikan's alleged negligence as a matter of law.

IT IS THEREFORE ORDERED that Miller Pipeline, LLC's Motion for Summary Judgment is **GRANTED**. The Court finds that there is no genuine issue of material fact, and Defendant Miller Pipeline, LLC is entitled to summary judgment as a matter of law on all of Plaintiffs' claims against it. There is no just reason for delay and judgment is entered in favor of Defendant Miller Pipeline, LLC.

Date: March 13, 2019

Judge John M.T. Chavis, II
Marion Superior Court

Distribution: Counsel of Record