McClain v. Jerry DeBriae Logging

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Concurring: David H Armstrong Dissenting: Elaine Marie Houghton

UNPUBLISHED OPINION

Russell McClain appeals an order of summary judgment dismissing his personal injury claim against Mike Beaston. We affirm.

FACTS

McClain and Beaston worked for Jerry DeBriae Logging Co., Inc. on November 7, 1997. After work, McClain was riding from the logging site to the parking lot in the bed of Beaston's pickup truck when it collided head-on with a Kenneth E. Mansigh Trucking, Inc. log truck that was hauling logs for DeBriae. McClain was injured and sued DeBriae, Mansigh, and Beaston. McClain settled with Mansigh, and the trial court dismissed DeBriae. The trial court then granted Beaston summary judgment, reasoning that Beaston was personally immune from liability under the exclusive jurisdiction of the Washington Industrial Insurance Act (IIA).

One issue disposes of this appeal: Was Beaston acting in the course of his employment at the time of the collision? If he was, summary judgment was proper because Beaston is immune from personal liability and McClain's remedy is limited to the IIA.

ANALYSIS

A. Standard of Review

When reviewing an order of summary judgment, we engage in the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). We must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. Wilson, 98 Wn.2d at 437. The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value. Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). After the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts sufficiently rebutting the moving party's contentions

and disclosing the existence of a material issue of fact. Seven Gables Corp., 106 Wn.2d at 13. The trial court should grant the order only if, from all the evidence, reasonable persons could reach but one conclusion. Wilson, 98 Wn.2d at 437.

When reviewing a trial court order for summary judgment, we only review evidence and issues brought to the trial court's attention. RAP 9.12. We review the facts in the light most favorable to the nonmoving party or determine whether there can be only one reasonable inference from the facts. Wilson, 98 Wn.2d at 437; Strachan v. Kitsap County, 27 Wn. App. 271, 274-75, 616 P.2d 1251, review denied, 94 Wn.2d 1025 (1980).

B. Jurisdiction of Washington Industrial Insurance Act

Here, the trial court granted summary judgment for Beaston reasoning that McClain's action fell under the exclusive jurisdiction of the IIA. Under the IIA, if Beaston was acting in the course of employment, he is immune from personal liability for McClain's injury. RCW 51.32.010.[1] Thus, unless there is a genuine issue of material fact as to whether Beaston was acting in the course of employment, we must affirm.

Based on statutory guidelines, courts have established standards to determine when an employee is 'acting in the course of employment.' See, e.g., Olson v. Stern, 65 Wn.2d 871, 877, 400 P.2d 305 (1965) (employee in parking lot not in 'course of employment'); Aloha Lumber Corp. v. Dep't of Labor & Indus., 77 Wn.2d 763, 766, 466 P.2d 151 (1970) (going to and from employment not in the 'course of employment'). For example, traveling along a route between the parking lot and place of abode in a commuter ride sharing arrangement, or carpool, has been determined not 'acting in the course of employment' under the 'going and coming rule.' ITT Cont'l Baking Co. v. Schneider, 27 Wn. App. 732, 736-37, 621 P.2d 1294 (1980), review denied, 95 Wn.2d 1018 (1981) (citing RCW 51.08.013). An injury occurring on the parking lot, even if located on the employer's premises, is also not considered an injury incurred while acting in the course of employment. See ITT Cont'l Baking, 27 Wn. App. at 737. But, an employee who is traveling at his employer's direction, in furtherance of the employer's business, or going and coming to work on the job site is acting in the course of employment. See ITT Cont'l Baking, 27 Wn. App. at 737. In turn, going and coming to work on the jobsite includes the hazardous route exception defined as:

going to or coming from work over a route in close proximity to the employer's premises when the route was the only or customary route or means of ingress and egress to the premises, and when the route involved a particular hazard not shared by the public generally{.} ITT Cont'l Baking, 27 Wn. App. at 736 (quoting Hamilton v. Dep't of Labor & Indus., 77 Wn.2d 355, 360, 462 P.2d 917 (1969)).

Therefore, the question presented in this appeal is whether Beaston and McClain, through this 'hazardous route exception,' were acting in the course of employment when they drove on the logging road. We hold that they were.

1. Background of the Hazardous Route Exception

Our courts recognize that the hazardous route exception includes routes to and from a job site that contain a special hazard not common to the general public that brings the employee traveling to and from work on that route within the definition of 'acting in the course of employment.' See, e.g., Hamilton, 77 Wn.2d at 363-64; ITT Cont'l Baking, 27 Wn. App. at 736.

During the early days of workers' compensation litigation in Washington, coverage was extended to employees in the course of employment even while off the premises, as well as employees on the employer's premises. Stertz v. Indus. Ins. Comm'n, 91 Wash. 588, 597, 158 Pac. 256 (1916). Such coverage was extended to employees on the employer's premises even if not engaging in activities related to employment if the injury occurred immediately prior to commencing work. Bristow v. Dep't of Labor & Indus., 139 Wash. 247, 249-50, 246 Pac. 573 (1926).

In 1927, the Legislature determined that workers' compensation extended to those who were in the course of employment whether on or off the employer's premises. Hamilton, 77 Wn.2d at 361. Following this, courts increasingly interpreted this provision more strictly, eventually holding that workers' compensation does not include injuries sustained on the employer's premises during the lunch hour because the employee was not in actual performance of his duties to the employer. D'Amico v. Conguista, 24 Wn.2d 674, 682-83, 167 P.2d 157 (1946).

In 1960, the Legislature extended workers' compensation coverage to those going and coming to work while on the employer's premises. Hamilton, 77 Wn.2d at 362. The resulting statute provided coverage for employees 'in the course of his or her employment' or during the lunch period while on the job site. RCW 51.32.015. The 'jobsite' was defined as 'the premises as are occupied, used or contracted for by the employer for the business or work process in which the employer is then engaged.' RCW 51.32.015. This enactment was intended to exclude compensation for employees injured in a parking area maintained by an employer. Olson, 65 Wn.2d at 877. But this enactment was not intended to exclude coverage of employees traveling along a hazardous route, defined as a route in 'close proximity to the employer's premises which is the only practical route and/or one customarily and normally used by employees engaged in the immediate act of going to or coming from the actual situs of their work.' Hamilton, 77 Wn.2d at 362-63.

In Hamilton, the Court found that this hazardous route exception applied to injuries sustained by an employee while crossing railroad tracks not owned by the employer but bisecting the employer's owned property. 77 Wn.2d at 357, 363. Despite not being 'owned' by the employer, the area was 'used' by the employer and between two areas 'controlled' by the employer, making it part of the 'jobsite.' Hamilton, 77 Wn.2d at 357, 363; see also ITT Cont'l Baking, 27 Wn. App. at 738. In ITT Continental Baking, the court addressed the issue of coverage when an employee was traveling along a public sidewalk outside the employer's building and was struck by a pan truck owned by the employer. 27 Wn. App. at 735. The court held that the hazardous route need not be 'controlled' by the employer,

but that because the route was 'used' by the pan trucks, the route became part of the jobsite under the hazardous route exception. ITT Cont'l Baking, 27 Wn. App. at 738, 741.

2. Elements of the Hazardous Route Exception

The hazardous route exception applies when the following requirements are met:

{A}n employee {1} injured, {2} immediate to the time of work, {3} while in the process of going to or from an employer-designated parking area, {4} lying a relatively short distance outside of what otherwise might be deemed work areas actually controlled by the employer, {5} over and along the only practical, proximate and customarily used route, which route, under given circumstances, {6} contained particular hazards likely to produce injuries and {7} which hazards were not of a kind commonly shared by the general public. ITT Cont'l Baking, 27 Wn. App. at 738 (quoting Hamilton, 77 Wn.2d at 363) (numbers added).

If, from the evidence presented, reasonable persons could only conclude that the elements of the hazardous route exception are satisfied, then Beaston is immune from a personal civil suit and McClain can recover his damages only from workers' compensation. See Hamilton, 77 Wn.2d at 363-64; ITT Cont'l Baking, 27 Wn. App. at 738; RCW 51.32.010. Here, the first two requirements, (1) that the employee must sustain injury, and (2) that the injury must occur 'immediate to the time of work,' are not seriously disputed. ITT Cont'l Baking, 27 Wn. App. at 738. McClain was injured immediately after work.

The third requirement is that the parties must have been going to or from an employer-designated parking area. ITT Cont'l Baking, 27 Wn. App. at 738. It is undisputed that Beaston and McClain were going to a parking lot, known as the 'Stella Park & Ride,' where DeBriae's employees parked their cars. In the morning DeBriae would send a company bus to the Stella Park & Ride to pick up the employees. The employees selected the lot at DeBriae's request due to its convenience and the wide variety of locations from where employees commuted.

McClain argues that because the employees selected this location, the lot is not an employer-designated parking area. But it was DeBriae's idea to establish a central parking lot from which to bus their employees to the logging site; the employees only recommended its location. The parking lot did not lose its employer-designated status simply because the employer solicited input from its employees as to the most convenient location for them to catch the company bus. Accordingly, the evidence presented supports only the conclusion that the parking lot was employer designated and the third element is satisfied.

The fourth requirement of the hazardous route exception is that the area lies within a relatively short distance outside of what otherwise might be deemed work areas actually controlled by the employers. ITT Cont'l Baking, 27 Wn. App. at 738. The dispositive issue is not the actual measurement of the

distance, but whether, in context, the parking lot is 'relatively' close. See Hamilton, 77 Wn.2d at 363. Neither the Hamilton Court nor the ITT Continental Baking court addressed this standard because, in both cases, the work site was adjacent to the hazardous route. See, e.g., 77 Wn.2d at 359; 27 Wn. App. at 733. But the nature of the work site is critical to a reasonable determination of whether the area or route in question is 'relatively close' to the work site. ITT Cont'l Baking, 27 Wn. App. at 740 ('When the accident happens from the dangers of the premises and the limits of the businesses there conducted, it is as though it happened upon the premises themselves. A relationship which brings the accident within the range of employment is all that is required.') (quoting Leatham v. Thurston & Braidich, 35 N.Y.S.2d 887, 889 (N.Y. App. Div. 1942). Here, the collision occurred approximately four miles from the logging site. While this is a substantial distance in the context of traveling surface streets, when considered in light of an unpaved, one-lane logging road leading to a logging site, it is not very far. As noted by the Hamilton and ITT Continental Baking cases above, the courts did not consider the actual distance but, rather, the relationship of the employee's route to the employer to determine close proximity. ITT Cont'l Baking Co. v. Schneider, 27 Wn. App. 732, 739-40, 621 P.2d 1294 (1980).

The parking lot in question is located at the closest possible point to the terminus of the unpaved logging road that leads directly to the logging site. In this context, the only reasonable inference is that the one-lane logging road on which the accident occurred was 'in close proximity' to the logging site.

As to the fifth element, the only practical, proximate, and customarily used route, Hamilton noted that while a route may be accessible to the public, if it is the route that would likely be taken by those employed or doing business with the employer it is a route customarily used and controlled by the employer. See also ITT Cont'l Baking, 27 Wn. App. at 739. Likewise, in ITT Continental Baking, the court found that the injury arose from the employer's business and should be compensable despite occurring on a public sidewalk. 27 Wn. App. at 739. To determine which distances are 'relatively close' to the employer, we look to the relationship of the hazardous route to the employer, as well as the nature and context of the employer's business. While the actual logging site was four miles away, the injuries sustained were the result of the employer's logging business and occurred along a route used primarily by employees or those engaged in the logging business with the employer. Given the nature of DeBriae's business, the only reasonable inference is that the road is a road developed and used for the business of logging.

The only proximate, practical, or customarily used route requirement is not established if there is an alternate route. ITT Cont'l Baking, 27 Wn. App. at 738. An alternative route may defeat the hazardous route exception, depending on the safety, remoteness, and convenience of the alternative route. ITT Cont'l Baking, 27 Wn. App. at 742 (citing 1A Larson, Workmen's Compensation, sec. 15.13 at 4-33 (1978)). An alternative route that is more remote or inconvenient will not defeat the hazardous route exception. See ITT Cont'l Baking, 27 Wn. App. at 742. If there exists a route that is reasonably safe and convenient and the employee selects a substantially more dangerous route, then the

hazardous route exception will usually not apply. See ITT Cont'l Baking, 27 Wn. App. at 742. And the trial court should first determine whether the danger is limited to one route before determining the safety and reliability of that route. See ITT Cont'l Baking, 27 Wn. App. at 742.

Here, the only way to reach the logging site is to travel along a series of logging roads. The record indicates that alternate logging road routes existed but McClain offered no evidence of the safety or convenience of any of those routes. Thus, the trial court could only determine the danger on the logging route Beaston and DeBriae had selected. Only one reasonable inference is supported by that evidence: The route Beaston and McClain used was the only proximate, practical, and customarily used route.

To resolve the sixth factor, the trial court must find the hazard is likely to cause injury. ITT Cont'l Baking, 27 Wn. App. at 738. The road on which Beaston and the other DeBriae employees were traveling was narrow, graveled, and had limited visibility. Safety procedures required drivers to call out their location through CB radio at every half mile marker. Traveling the one-lane road from the parking lot to the logging site necessarily creates a high risk of collision and injury.

But even if the route is hazardous, the hazard must be the kind not commonly shared by the general public for the hazardous route exception to apply. ITT Cont'l Baking, 27 Wn. App. at 738. The evidence presented established that the logging roads in this case were roads technically open to the general public. But potential accessibility by the public is not the dispositive factor. In ITT Continental Baking, the court found that the employer's business created a hazard to the use of a public roadway by its employees does not create a hazard generally shared by the public despite being accessible to the public. 27 Wn. App. at 739. And in Hamilton, the Court found that a route technically open to the public posed a risk not generally shared by the public because the route was used mainly by employees and those doing business with the employer. See Hamilton v. Dep't of Labor & Indus., 77 Wn.2d 355, 358, 360, 462 P.2d 917 (1969); ITT Cont'l Baking, 27 Wn. App. at 739. Here, although the public was not prohibited from using the road, the evidence presented established that only employees of DeBriae or those conducting business with DeBriae likely used the logging roads and performed the safety alerts every half mile. Thus, although a member of the public choosing to use the narrow, graveled, one-way road would experience the same hazards as the DeBriae employees, the only finding reasonably supported by this record is that the road's hazards are not those generally shared by the public. See ITT Cont'l Baking, 27 Wn. App. at 739; Hamilton, 77 Wn.2d at 359-60. Therefore, a reasonable jury would only find that the logging road would be used primarily, if not solely, by employees and those doing business with DeBriae, hence meeting this requirement.

Any reasonable jury would find that Beaston was traveling from the jobsite to the employee parking lot and that he was on a hazardous route. Thus, Beaston was acting within the course of employment at the time of the collision and McClain's remedy lies within the exclusive jurisdiction of the IIA.[2]

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, A.C.J.

I concur:

ARMSTRONG, J.

Houghton, J. (dissenting)

I respectfully dissent. In doing so, I focus on the seventh requirement of the hazardous route exception. As noted by the majority, in ITT Cont'l Baking Co. v. Schneider, 27 Wn. App. 737, 739, 621 P.2d 1294 (1980), review denied, 95 Wn.2d 1018 (1981), the court held that where a hazard exists on a public route due to the employer's business, it is a hazard not generally shared by the public despite being accessible to the public. Here, because the danger does not arise from Jerry DeBriae's business, but from the general nature of the road, reasonable minds could differ as to whether the hazard is generally shared by the public.

Thus, there is a genuine issue of material fact and summary judgment should not have been granted.

Houghton, J.

1. The statute reads in part: Each worker injured in the course of his or her employment, or his or her family or dependents in case of death of the worker, shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever . . . . RCW 51.32.010.

2. McClain claims that a Department of Labor & Industries (L&I) order denying his workers' compensation claim was not appealed and, therefore, should be considered a final adjudication of fact and law. McClain further argues that the L&I order found that the parties were in a carpool and that this finding should bind both Beaston and the trial court. But there is no evidence in the record to confirm the existence of a L&I order nor is there anything provided in the record that shows that the denial order was based on findings of fact and conclusions of law. See Inland Foundry Co., Inc. v. Dep't of Labor & Indus., 106 Wn. App. 333, 340, 24 P.3d 424 (2001). Thus, we cannot address McClain's assertion that the L&I order, if any, bound the trial court.