VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

KENDALL ROBERTS, Plaintiff v. ADA TRAFFIC CONTROL, LTD., ADMINISTRATOR OF ESTATE OF BRUCE DEVENGER, MICHAEL O'NEIL, and PATRIOT INSURANCE, Defendants	Docket No. 21-CV-01101

RULING ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This action arises from an early morning car accident on Interstate 89 in Richmond. A truck owned by Defendant ADA Traffic Control, Ltd. (ADA) and driven by ADA employee Bruce Devenger crossed the median on I-89 and collided head-on with Plaintiff Kendall Roberts, who sustained serious injuries in the collision. Mr. Devenger was killed in the collision. Defendant Michael O'Neil, another ADA employee, was a passenger in the truck with Devenger and was injured in the collision.

Roberts brings various claims against Defendants, including negligence, negligent entrustment, respondeat superior liability, and negligent hiring and supervision. He also brings a "direct action for breach of contract and bad faith" against ADA's insurer, Patriot Insurance. Now before the court is Roberts' motion for partial summary judgment on two issues: ADA's liability for the actions of its employees under respondeat superior (Count VI), and Patriot Insurance's coverage obligation (Count VIII). Patriot also renews a motion to dismiss that it originally filed last year.

Undisputed Facts

Defendant ADA is a traffic control company. Michael O'Neil and Bruce Devenger were ADA employees at the time of the accident. O'Neil and Devenger lived together in Sheffield, Vermont. They worked together and routinely rode together to and from ADA's job sites in a company-issued truck with company equipment, including cones, road signs, and metal sign stands. They would typically get to ADA's job sites before anyone else to set up the equipment, and would bring the equipment back and forth in the truck between their home and ADA's ever-changing job sites. ADA paid for the gas used in driving the company truck, and paid O'Neil and Devenger a stipend for travel time.

Devenger did not have a valid driver's license. ADA was aware that Devenger had convictions for DUI and careless and negligent driving when he was hired. Thus, only O'Neill, and not Devenger, executed an employee acknowledgement form with respect to the ADA truck. ADA's Vehicle Policy for Field Based Employees provides that O'Neill "will be the only driver of the vehicle, and no other authorized users may be permitted to use the vehicle." Ex. C at 10. The policy also provides that "[i]ndividuals are prohibited from operating any vehicle on company business or an ADA vehicle at any time while under the influence of alcohol or any illegal substance." Id. at 9.

Only O'Neill was authorized to drive, but at least some ADA managers were aware that Devenger drove the truck on occasion. O'Neill understood that Devenger was approved to drive the truck when O'Neill took time off. He also understood that the two of them were expected to take turns driving as they placed signs along the road as part of their duties. ADA denies giving such approval.

According to Jillian King, an ADA manager at the time, before the accident Devenger sometimes smelled of alcohol on the job, which she reported, and on one

occasion locked himself out of the ADA truck in front of a liquor store, an event that was photographed by another employee and circulated around the company. Pl.'s Am. Statement of Facts ¶ 12 n.1 (citing King Dep. at 20–23, 40–41, Ex. 22).

O'Neil and Devenger worked together on the NICOM project in 2019, which involved sealing roads throughout the state. They would ride together from their home in Sheffield to the NICOM project job sites and arrive before the other flaggers to set up cones, signs, and other equipment. At approximately 6 A.M. on August 23, 2019, O'Neil and Devenger picked up the signs and cones from a job site, loaded them into the ADA truck, and left the site with O'Neil driving. After leaving the last project site for that shift, they stopped at a Jiffy Mart in Shelburne, where O'Neil purchased Devenger four 25-ounce "Natty Daddy" beers and a coffee for himself. Devenger began to drive the vehicle (with O'Neill as a passenger) when they left the Jiffy Mart. At approximately 7 A.M., while Plaintiff Roberts was driving to work on Interstate 89 in Richmond, the ADA truck driven by Devenger crossed the median and collided head-on with Roberts.

Devenger died in the collision, and O'Neill and Roberts were injured. Empty cans of Natty Daddy beer were located in the ADA vehicle immediately after the accident. According to the State of Vermont Uniform Crash Report, Devenger's blood alcohol concentration at the time of the accident was .199. O'Neill was not disciplined for letting Devenger drive the truck or for buying him beer.

The parties dispute whether Devenger was expected to drive the truck to accomplish his duties and the level of knowledge that management had regarding his driving the company truck.

Discussion

Plaintiff Roberts moves for partial summary judgment on two issues:

(1) Whether Defendant ADA is liable for the actions of its employees, O'Neil and Devenger, under respondeat superior; and

(2) Whether Patriot Insurance is obligated to provide insurance coverage due to O'Neil's and Devenger's "use" of ADA's truck.

1. Respondeat Superior Liability

Roberts contends that based on the undisputed facts, ADA is liable for the actions of its employees, O'Neil and Devenger, under the doctrine of respondeat superior as a matter of law. "Under the settled doctrine of respondeat superior, an employer or master is held vicariously liable for the tortious acts of an employee or servant committed during, or incidental to, the scope of employment." Brueckner v. Norwich Univ., 169 Vt. 118, 122–23 (1999); *see* Restatement (Third) of Agency § 7.07(1) ("An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment."). To fall within the scope of employment, "conduct must be of the same general nature as, or incidental to, the authorized conduct." Brueckner, 169 Vt. at 123 (citing Restatement (Second) of Agency § 229(1) (1958)).

> Conduct of the servant falls within the scope of employment if: (a) it is of the kind the servant is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master; and (d) in a case in which [] force is intentionally used by the servant against another, it is not unexpectable by the master. 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 and space limits, or too little actuated by a purpose to serve the master.

Id. (citing Restatement (Second) of Agency § 228).

ADA suggests that its policies prohibiting drunk driving and prohibiting unauthorized drivers from driving its trucks mean that Robert's summary judgment motion must fail. The policies alone, however, do not protect ADA. In general, "the inquiry turns not on whether the act done was authorized or was in violation of the employer's policies, but rather whether the acts can properly be seen as intending to advance the employer's interests." Sweet v. Roy, 173 Vt. 418, 431–32 (2002) (quotation omitted). Thus, there is "no requirement that the master specifically authorize the precise action the servant took. Such a requirement would mean that there could rarely be vicarious liability for intentional torts because the master would not specifically authorize the commission of an intentional tort." Id. at 432 (citation omitted). As another court has put it:

> Ultimately, the scope of employment encompasses the activities that the employer delegates to employees or authorizes employees to do, plus employees' acts that naturally or predictably arise from those activities.
>
> This means that the scope of employment—which determines whether the employer is liable—may include acts that the employer expressly forbids; that violate the employer's rules, orders, or instructions; that the employee commits for self-gratification or self-benefit; that breach a sacred professional duty; or that are egregious, malicious, or criminal.

Cox v. Evansville Police Dep't, 107 N.E.3d 453, 461 (Ind. 2018). The court must therefore examine not whether Devenger and O'Neill's conduct violated ADA's policies, but whether their conduct could "be seen as intending to advance [ADA's] interests." Sweet v. Roy, 173 Vt. at 431–32.

Numerous undisputed facts support the conclusion that O'Neill's act of letting Devenger drive the truck was within the scope of his employment. First, the truck was owned by ADA, loaded with ADA equipment needed at job sites, and occupied and

operated by ADA employees. Second, ADA gave O'Neill express permission to use the truck to travel from his home (which he shared with Devenger) to the job sites. Moreover, both O'Neill and Devenger were paid for travel to and from their home to job sites, and ADA paid for gas and maintenance for the truck. The morning of the accident, the truck did not detour from the most direct route from the job site to O'Neill's home other than a brief stop at a Shelburne convenience store, which was on the route. On these facts, a reasonable jury would have to conclude that O'Neill's conduct "can properly be seen as intending to advance the employer's interests." Sweet, 173 Vt. at 431–32.

The fact that O'Neill was not explicitly authorized to allow Devenger to drive the truck does not compel a different conclusion. Importantly, "[a]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment." Restatement (Second) of Agency § 230 (1958). The Restatement's illustrations are helpful: "P directs his salesman, in selling guns, never to insert a cartridge while exhibiting a gun. A, a salesman, does so. This act is within the scope of employment." Id. § 230, cmt. b, illus. 1; *see also* id., cmt. b, illus. 2 ("P, the owner of a house, directs his janitor to collect the rubbish and deposit it only in barrels provided for the purpose. The janitor, collecting the rubbish, burns it in a vacant lot behind the house. Under normal circumstances and if performed as part of his service, the janitor's act of burning the rubbish is within the scope of employment.").

Letting a co-worker take turns driving a company truck—aside from violating a company policy—is perfectly natural and innocuous, "not unexpectable," *see* Restatement (Second) of Agency § 228, and clearly tends to advance ADA's interest in moving the truck to its approved off-shift storage location at the end of a shift. Indeed, courts have found vicarious liability under more extreme scenarios. *See*, *e.g.*, Hechinger Co. v. Johnson, 761

A.2d 15, 25 (D.C. 2000) (where supervisory staff person of store assaulted plaintiff-customer in the course of a discussion over scraps of wood given to plaintiff by other customers, store could be held vicariously liable); Gonpere Corp. v. Rebull, 440 So.2d 1307, 1308 (Fla. Dist. Ct. App. 1983) (jury could find apartment owner vicariously liable where apartment manager shot tenant during discussion of tenant's eviction notice); Pelletier v. Bilbiles, 227 A.2d 251, 253 (Conn. 1967) (responsibility of store employee to ensure customers did not misbehave in the store made store owner vicariously liable when employee beat a customer to stop him from misbehaving; "fact that the specific method a servant employs to accomplish his master's orders is not authorized does not relieve the master from liability").

"Where it is 'clearly indicated' that the servant was acting within the scope of the employment, the court may hold the master vicariously responsible as a matter of law." Sweet, 173 Vt. at 433 (quoting Restatement (Second) of Agency § 228 cmt. d); *see also* id. at 422, 430–33 (trial court did not err by concluding as matter of law that trust was responsible for acts of illegal self-help eviction by its property manager, including smashed windows, slashed tires, and cut underground electrical wires); Ploof v. Putnam, 83 Vt. 252, 259 (1910) (although scope of employment is normally a question of fact, it can be decided as a matter of law where "facts and the inferences to be drawn therefrom are not in dispute"). As discussed above, the facts here establish that O'Neill was acting within the scope of his employment when he let Devenger drive the ADA truck, whether expressly approved or not. ADA is vicariously liable for O'Neill's conduct as a matter of law.[1]

[1] The issue of whether O'Neill knew that Devenger was intoxicated at the time is not one that the court can address today.

The court reaches a different conclusion as to ADA's liability for Devenger's conduct, however.[2] "An act may be within the scope of employment although consciously criminal or tortious." Restatement (Second) of Agency § 231 (1958). The official comment to the Restatement explains:

> The fact that the servant intends a crime, especially if the crime is of some magnitude, is considered in determining whether or not the act is within the employment, since the master is not responsible for acts which are clearly inappropriate to or unforeseeable in the accomplishment of the authorized result. The master can reasonably anticipate that servants may commit minor crimes in the prosecution of the business, but serious crimes are not only unexpectable but in general are in nature different from what servants in a lawful occupation are expected to do.

Id., cmt a.

Some courts have found that employers can be liable for injuries resulting from their employees' intoxicated driving. *See*, *e.g.*, Dickinson v. Edwards, 716 P.2d 814, 820 (Wash. 1986) (concluding that disputed material facts existed as to whether intoxicated employee involved in car accident after attending company banquet was within scope of employment); Harris v. Trojan Fireworks Co., 174 Cal. Rptr. 452, 457 (Cal. Ct. App. 1981) (jury could find that driving home intoxicated from a work party was within the scope of employment). Another court has ruled as a matter of law that such conduct was "incidental to the employment task [the employee] was performing," and thereby concluded that it did not take the employee outside the scope of employment. Ortiz v. Clinton, 928 P.2d 718, 723–25 (Ariz. Ct. App. 1996) (fact that drunk driving violated employer's rules did not change overall scope of employee's job duties of driving group

[2] As with the policy against unauthorized drivers driving the company truck, the fact that ADA's policy also prohibits drunk driving by itself does not save ADA from summary judgment.

home residents to restaurant). Other courts, however, have held that this presents a fact question for the jury or that drinking on the job did not result in vicarious liability. *See, e.g.*, Williams v. J. Luke Constr. Co., LLC, 99 N.Y.S.3d 460 (N.Y. App. Div. 2019) (factual dispute existed regarding whether intoxicated employee driving company vehicle to job site was acting within scope of employment at time of accident); Prugue v. Monley, 28 P.3d 1046, 1051 (Kan. Ct. App. 2001) (drinking alcohol at work was not required or inherent to bar manager's job, nor did his alcohol consumption benefit bar owner).

Here, a jury could find ADA vicariously liable for Devenger's intoxicated driving. Actual or constructive management knowledge of prior instances of unauthorized driving or drinking on the job, along with a lack of response or discipline for that conduct, would allow a reasonable inference that ADA approved of such conduct and that it was therefore within the scope of Devenger's employment. However, there are disputed material facts as to the level and extent of management knowledge of Devenger's prior instances of driving the ADA truck, as well as whether certain managers had authority to enforce the driving policy. Thus, the question is not one the court can decide as a matter of law. It is a question for the jury.

2. Claim Against Patriot Insurance

Count VIII is captioned "Direct Action for Breach of Contract and Bad Faith Pursuant to 8 V.S.A. § 4203(3)." While confusingly presented, this claim in fact appears to assert three distinct claims: first, that Patriot's "failure to acknowledge Mr. Devenger's status as a permissive user" of ADA's truck under terms of its insurance policy was "in effect a denial of coverage" to ADA, O'Neil, and Devenger, and that Patriot therefore breached its contract with ADA; second, that Patriot breached the covenant of good faith and fair dealing "by failing to act consistently with the justified expectations" of ADA,

O'Neil, and Devenger; and third, that Roberts is entitled to a declaratory judgment that ADA, O'Neil, and Devenger are insured for this loss pursuant to 12 V.S.A. § 4711. Compl. ¶¶ 54–58. Roberts moves for summary judgment on this Count, and Patriot renews its motion to dismiss it.

The breach of contract and bad faith claims are easily disposed of. Vermont does not recognize third-party bad faith claims. Larocque v. State Farm Ins. Co., 163 Vt. 617, 618 (1995) (mem.); *see also* Hamill v. Pawtucket Mut. Ins. Co., 2005 VT 133, ¶ 18, 179 Vt. 250. This rule is not unique to Vermont. *See* Benchmark Ins. Co. v. Atchison, 138 P.3d 1279, 1284 (Kan. Ct. App. 2006) (listing cases).[3] "In general, direct actions against the insurer by persons other than the insured are prohibited because of the absence of privity of contract." Korda v. Chicago Ins. Co., 2006 VT 81, ¶ 25, 180 Vt. 173; *see also* 16 Williston on Contracts § 49:8 (4th ed.) ("Generally, . . . a person other than the insured or owner of the policy, who is not named as the beneficiary, has no right of action against the insurer, unless there is a showing that the particular third party, although not named in the policy, is an intended beneficiary of the contract, as opposed to a mere incidental beneficiary.") (footnote omitted); McMurphy v. State, 171 Vt. 9, 16 (2000) (to sue on a contract between other parties, a plaintiff must establish that he was "a third-party beneficiary to the contract rather than an incidental beneficiary"). A tort victim allegedly injured by an insured, as here, is not a third-party beneficiary to the insured's liability insurance contract. This helpful discussion by Alaska's Supreme Court explains why:

[3] Even assuming that Vermont recognized third-party bad faith claims, such a claim requires that the insurer has denied an insurance claim, *see* Bushey v. Allstate Ins. Co., 164 Vt. 399, 402 (1995), and Roberts does not allege that Patriot has actually denied a claim. Roberts instead alleges only that Patriot's "failure to acknowledge" Devenger's status as a permissive user is "in effect a denial of coverage." Compl. ¶ 56. Moreover, Patriot has executed a reservation of rights and bilateral non-waiver agreement, in which it has agreed to defend the lawsuit without waiving its right to deny coverage in the event of liability.

> An intended beneficiary can sue to enforce an insurance contract. An incidental beneficiary, such as a tort victim injured by the insured, on the other hand, cannot enforce the contract between the insured and insurer. The tort victim is a beneficiary of the defendant's insurance contract in the sense that the contract makes it more likely that there will be money for the tort victim to collect. But the tort victim only benefits from the existence of the insurance contract indirectly: The insured did not purchase the policy with the intention to benefit the tort victim; rather, the insured purchased the policy to protect the insured from tort liability. Thus, the tort victim is only an incidental beneficiary.

Ennen v. Integon Indem. Corp., 268 P.3d 277, 284 (Alaska 2012) (footnotes omitted). Nor has Roberts offered any persuasive rationale for treating him as an intended beneficiary.

A statutory or contractual provision can establish an exception to this general rule. *See generally* 7A Couch on Ins. § 104:2 ("*in the absence of a contractual provision or a statute or ordinance to the contrary,* at common law, the absence of privity of contract between the claimant and the insurer bars a direct action by the claimant against the latter under . . . liability insurance, at least where the direct action is on the basis of the insured's negligence") (emphasis added) (footnotes omitted). The parties point to no such contractual provision. One such statute creates a limited exception:

> (2) No action shall lie against the company to recover for any loss under this policy, unless brought within one year after the amount of such loss is made certain either by judgment against the insured after final determination of the litigation or by agreement between the parties with the written consent of the company.
>
> (3) The insolvency or bankruptcy of the insured shall not release the company from the payment of damages for injury sustained or loss occasioned during the life of the policy, and in case of such insolvency or bankruptcy an action may be maintained by the injured person or claimant against the company under the terms of the policy, for the amount of any judgment obtained against the insured not exceeding the limits of the policy.

8 V.S.A. § 4203. Roberts has alleged that Devenger (but not O'Neill or ADA) is insolvent. Compl. ¶ 58. Even so, the statute plainly requires a judgment against the insured prior to any direct action by the injured person against the insurer. 8 V.S.A. § 4203; *accord* Korda v. Chicago Ins. Co., 2006 VT 81, ¶ 25, 180 Vt. 173 (permitting direct action against insurer where plaintiff alleged that insured was insolvent and plaintiff had a $2 million judgment). Obviously, no judgment has yet occurred here.

Roberts maintains that he is entitled, at the very least, to a declaration of insurance coverage. *See* 12 V.S.A. § 4711. But the Declaratory Judgments Act does not defeat the plain language of 8 V.S.A. § 4203, which clearly and specifically forecloses that avenue prior to a judgment in the underlying tort case. *See generally* State of Vermont Agency of Nat. Res. v. Parkway Cleaners, 2019 VT 21, ¶ 40, 209 Vt. 620 (observing "the general rule of statutory construction that a specific statute governs over a more general one"). Roberts relies on Coop. Fire Ins. Ass'n of Vermont v. Bizon, 166 Vt. 326 (1997), where the Court held that the claimant had standing to appeal a declaratory judgment that the insured's actions fell under the policy's "intentional acts" exclusion from coverage. Bizon is distinguishable in multiple ways, however. First, the insurer there brought the declaratory judgment action. Id. at 327–28, 329. Unlike with a third-party claimant such as Roberts, no statute or common law rule prohibits an insurer from seeking a declaratory judgment regarding the coverage issue prior to a judgment in the underlying tort case. Second, the insurer in Bizon voluntarily joined the third-party claimant in its declaratory judgment action. Id. at 330; *see also* id. at 332 ("Once he was joined as a party, his legal rights were determined by the declaratory judgment, and he could appeal because that judgment affected him adversely."). Furthermore, the Bizon Court reasoned, a declaratory judgment proceeding was needed there "because the question of insurance

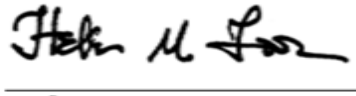
coverage would not be resolved by the tort action, and [the insurer] would be in the position of defending the tort action while asserting that [the insured's] actions were intentional." Id. at 331. Here, in contrast, the tort liability and insurance coverage issues appear to be related, and the tort action may in fact resolve the coverage dispute. Indeed, the insurer's position at oral argument on the motion to dismiss in front of Judge Hoar was that the tort action would determine the coverage issue.

Roberts might be entitled to sue Patriot in the future pursuant to 8 V.S.A. § 4203, in the event he obtains a judgment against ADA, O'Neill, and/or Devenger. For now, however, he has no such right of action against Patriot.

Order

The court grants Patriot's renewed motion to dismiss Count VIII. The court grants Plaintiff's motion for partial summary judgment on Count VI as to O'Neill's conduct, but denies it as to Devenger's conduct. Plaintiff's motion for partial summary judgment as to Count VIII is moot. As the court does not find a discovery schedule in the file, it is unclear whether the parties are ready for trial. The court shall schedule a status conference.

Electronically signed on November 18, 2022 pursuant to V.R.E.F. 9(d).



Helen M. Toor
Superior Court Judge