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Torts -- Workers' compensation immunity -- Where interrogatories and admissions of defendant establish that defendant, who was plaintiff's co-worker, was driving his own vehicle off employer's repair lift and was not acting in furtherance of his employer's business at the time his vehicle injured plaintiff, immunity provided by chapter 440 to defendant's employer does not extend to defendant

EVERTON McLEAN and ALTHEA McLEAN, his wife, Plaintiffs, vs. WISNEL EUGENE and GLORIA SIVESTRE, Defendants. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. 04-011170 (09). June 23, 2009. David Krathen, Judge. Counsel: Andrew J. Weinstein, Weinstein Law Firm, Coral Springs, for Plaintiff. Fred L. Fulmer, for Defendant.

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE TORT-IMMUNITY DEFENSE

THIS MATTER came before the Court for a hearing on June10, 2009, for Plaintiffs' Motion for Partial Summary Judgment on the issue of Defendants' Tort-Immunity Defense, and the Court having been apprized that the parties agreed to same, it is hereby,

ORDERED AND ADJUDGED:

1. That Plaintiffs' Motion for Partial Summary Judgment is hereby GRANTED.

2. There is no genuine issue of any material fact as to Defendants' Tort-Immunity Affirmative Defense.

3. There is no genuine issue of material fact as to whether Defendant, WISNEL EUGENE, was acting in furtherance of his employer's business when he was operating the 1991 Geo on the date of the accident and thus the immunity afforded by Chapter 440 of the Florida Statutes does not extend to said Defendant.

4. Florida Statute Section 440.11(1) states in relevant part, "The same immunities from liability enjoyed by an employer shall extend as well to each employee of the employer when such employee is acting in furtherance of the employer's business. . .Such fellow-employee immunities shall not be applicable to an employee who acts, with respect to a fellow employee with. . .gross negligence when such acts result in injury or death or such acts proximately cause such injury or death."

5. Defendants alleged in Paragraph 15 of their Amended Answer and Affirmative Defenses that "plaintiffs' claim is barred from recovery against defendants by immunity provided by Chapter 440 of the Florida Statutes. . .plaintiffs' sole and exclusive remedy is through worker's compensation benefits to them pursuant to Chapter 440 of the Florida Statutes."

6. On October 1, 2004, Plaintiffs propounded Interrogatories upon the Defendant, WISNEL EUGENE. Interrogatory #23 asks, "At the time of the incident described in the Complaint, was

the Defendant engaged in any mission or activity for any other person or entity, including any employer?"

7. Defendant served his Responses on November 4, 2004, answering “No,” to Interrogatory #23. Defendant cannot change, alter or amend its position in order to resolve a genuine issue of material fact in its favor. “A party may not, after having given a deposition or an affidavit in a case, subsequently change his testimony without adequate explanation in order to create an issue when the opposing party moves for summary judgment,” *Gardiner v. Holifield,* 639 So.2d 652 at 657 (Fla. App., 1994).

8. Furthermore, the court in *Ouellette v. Patel,* 967 So.2d 1078, 1082 (Fla. 2d DCA 2007), held “a party may not file his or her own affidavit, or that of another, baldly repudiating his or her own deposition testimony to avoid entry of a summary judgment.” A party may only file a subsequent affidavit for purposes of explaining prior sworn testimony given, if the explanation is credible and not inconsistent with previous sworn testimony. *Id*. at 1083. The Defendant cannot renounce his prior sworn Response to Interrogatory #23. Any subsequent affidavit by the Defendant claiming he was acting in furtherance of his employer's business when the accident occurred would be inconsistent with previous sworn testimony and, thus is not permitted.

9. On February 7, 2007, the Plaintiffs propounded its Supplemental Request for Admissions.

10. On March 1, 2007, Defendants served their Response to Plaintiff's Supplemental Admissions, admitting:

a. That the 1991 GEO motor vehicle involved in the subject accident was on the lift in the service repair area of Maroone Toyota on the date of the subject accident;

b. That WISNEL EUGENE was employed by Maroone Toyota in the position of lube technician on the date of the subject accident;

c. That the 1991 GEO motor vehicle involved in the subject accident was owned by WISNEL EUGENE and GLORIA SILVESTRE.

11. Essentially, the Interrogatories and Admissions of Defendant WISNEL EUGENE establish that, at the time of the accident, WISNEL EUGENE was driving his own motor vehicle off of a repair lift and was not acting in furtherance of his employer's business.

12. “The liability of a master can arise in such instances only when the act of the servant is done within the real or apparent scope of his master's business. The master's liability does not arise when the servant steps aside from his employment to commit the tort or does the wrongful act to accomplish some purpose of his own. If the tort is activated by a purpose to serve the master or principal, then he is liable. Otherwise, he is not,” *City of Miami v. Simpson,* 172 So.2d 435 (Fla. 1965); *see also Friedman v. Mutual Broadcasting System,* 380 So.2d 1313 (Fla. 3rd DCA 1980). At the time Defendant WISNEL EUGENE's vehicle injured the Plaintiff, the Defendant was fixing his *own car,* in essence, accomplishing some purpose of his *own,* an act that is *not* activated by a purpose to serve his principal, Maroone Toyota.

13. In *Friedman v. Mutual Broadcasting System,* the court held that one is not working in furtherance of the employer's business when his or her actions are not responsibilities or duties the employee is to exercise for the employer. *Friedman,* 380 So.2d at 1314. Sworn testimony shows maintenance done by an employee on his own car is not a responsibility nor a duty exercised for the employer's business. On October 13, 2006, Colin Lord testified an employee is not allowed to perform approved maintenance on his own car "during his normal work shift to interfere with our production." (see p. 41 of Deposition of Colin Lord, previously filed with This Court). Since maintenance on an employee's own car is not to be done while on shift so as to not disrupt the company's production, WISNEL EUGENE was not acting in furtherance of Maroone Toyota's benefit when he performed maintenance on his own car.

14. Hence, at the time WISNEL EUGENE was driving his 1991 GEO off of the repair lift in the Maroone Toyota service area, he was *not acting in furtherance of Maroone Toyota's business.* Therefore, the immunity provided by Chapter 440 of the Florida Statutes enjoyed by Maroone Toyota does not extend to Defendant WISNEL EUGENE.

15. A motion for summary judgment should be granted only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See, *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla. 2000).

16. The moving party has the burden to conclusively prove the nonexistence of a material fact. See, *Holl v. Talcott,* 191 So.2d 40, 43 (Fla. 1966); *Albelo v. S. Bell,* 682 So.2d 1126, 1129 (Fla. 4th DCA 1996). However, once this burden is met, the burden shifts to the nonmoving party. See, *Holl*, at 43-44.

17. Since WISNEL EUGENE owned the 1991 Geo involved in said accident; and since WISNEL EUGENE was repairing his own car on the date of the accident; and since WISNEL EUGENE's repairs were actions done solely for Defendant's own benefit and not activated by a purpose to serve his principal, Maroone Toyota, there is no genuine issue of material fact as to whether WISNEL EUGENE was operating the 1991 Geo outside the scope of his employment on the date of accident, and Plaintiff is entitled to judgment as a matter of law.

18. This Order shall also act as an award of Summary Judgment on any defense raised by the Defendants in their Amended Answer and Affirmative Defenses which raise allegations contrary to this finding.

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