IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

THIRD DISTRICT

CASE NO. 3D23-953

MARTHA SUAREZ IZQUIERDO,

Appellant,

v.

PRESIDENTE SUPERMARKET NO. 27, INC., et al.,

Appellees.
_____/

# INITIAL BRIEF OF APPELLANT

On appeal from the Eleventh Judicial Circuit
in and for Miami-Dade County

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## STATEMENT OF THE CASE AND FACTS

This lawsuit arises out of a motor vehicle collision. Julio Martinez was operating a Chevrolet Express van in Hialeah (R40). The van was owned by Defendants, Cuba Tropical, Inc. and Pedro Rodriguez (R40).

### A. Overview of Business Operations

Cuba Tropical, Inc. is a grocery warehouse and distribution business (R795). It purchases products and then distributes the products to its stores called Presidente Supermarkets (R795-96). Some of the Presidente Supermarkets operate as a DBA under the corporate name Tropical Supermarket (R798). The corporate representative for Cuba Tropical, Ariel Martinez, also runs Presidente Supermarkets (R800). The corporations have several shared employees including Pedro Osmay Rodriguez, who Ariel Martinez described as the owner of all the Presidente Supermarkets and Cuba Tropical (R800). Pedro Osmay Rodriguez is also called "Omar Rodriguez" by the employees (R801).

The interrelationships among the various Defendant entities requires some explanation. The Tropical Supermarket/Presidente

grocery stores are all separate corporate entities (R770-71). The driver of the van, Julio Martinez, was an employee of Tropical Supermarket No. 12, Inc., which does business as Presidente Supermarket No. 14 (not as Presidente No. 12, as one might expect) (R756; 798; 814-15)[1]. The shopping carts at each Presidente grocery store are used by customers to transport groceries home and leave them outside their homes when finished (R815). As Ariel Martinez, the corporate representative, explained (R815):

> So [the customers] don't have cars. They take our shopping carts and they take it [sic] to the houses. Shopping carts are very expensive. So, we actually have vans that are driving all day around the neighborhood, picking up our shopping carts and bringing them back to the store. That was the job that this gentleman, Julio Martinez, was doing at the time of the accident, driving around the neighborhood, picking up shopping carts and bringing it back to the store.

The carts belong to the Presidente grocery stores, not Cuba Tropical (R816). However, the shopping carts do not belong to any specific store (R816). They are transferred amongst the Presidente stores depending on what each store needs (R816). They are collected

[1] The driver involved in the crash, Julio Martinez, should not be confused with the corporate representative who testified, Ariel Martinez (R817).

by personnel from different stores and then distributed amongst the Presidente stores depending on need. The van being driven by Julio Martinez on the day of the collision was owned by Cuba Tropical, Inc. and Pedro Rodriguez (R811-12).

Although Presidente 14 was assigned a van by Cuba Tropical, it was inoperable on the day of this incident. So, Julio Martinez borrowed the van assigned to Presidente 27, which had no employee to collect carts that day (R818-19; 821). The Presidente employees do not need permission from Cuba Tropical to transfer a van from one store to another (R820). The employee who transferred the van from Presidente 27 to Presidente 14 was Mr. Abel, the usual driver of the van (R821).

In interrogatory answers, Presidente No. 14 claimed Julio Martinez was using the Cuba Tropical/Rodriguez van assigned to Presidente No. 27 to collect shopping carts for President No. 14 (R756). Julio Martinez was on the books of Presidente 14 as an employee, but the shopping carts he collected were used by all area Presidente stores, not just Presidente 14.

Plaintiff filed a lawsuit with causes of action against Julio Martinez for negligence (Count I), vicarious liability against Cuba

Tropical as the owner of the van (Count II), Vicarious Liability against Presidente No. 14 based on Respondeat Superior (Count IV), and Vicarious Liability against Presidente No. 27 based on Respondeat Superior (Count V) (R502-10).

Presidente No. 27 filed a Motion for Summary Judgment arguing it had no liability because Julio Martinez was an employee of Presidente No. 14 and was driving a vehicle owned by Cuba Tropical. The motion claimed the following facts supported summary judgment (R719-20):

1) Plaintiff alleged a claim based on respondeat superior against Presidente Supermarket No. 27;
2) Julio Martinez was an employee of Presidente Supermarket No. 14, not Presidente Supermarket No. 27.

In response, Plaintiff presented the following evidence (R770-72):

1) The Presidente stores are separately owned and operated;
2) Customers use the shopping carts to bring their groceries home (R815);

3) The shopping carts taken by customers were owned by the different Presidente stores, but no one store owns any particular shopping cart (R816);
4) The van driven by Martinez was in the possession of Presidente 27 but entrusted to Martinez by Abel, an employee of Presidente Supermarket 27 who usually drove the van (R780; 782);
5) The employee who usually drove the van for President 27 went home sick that day (R779-80);
6) The van usually in the possession of Presidente No. 14 was unavailable that day because it was being service (R778);
7) It was common practice for Cuba Tropical to lend its vehicles to any Presidente store that needed a vehicle (R781); and
8) After borrowing the van, Martinez collected shopping carts for the Hialeah Presidente stores (R815-16).

The trial court entered summary final judgment in favor of Presidente No. 27 (R881). This appeal followed.

## SUMMARY OF THE ARGUMENT

Under the summary judgment standard, Presidente No. 27 was required to prove there is no genuine dispute as to any material fact and that it was entitled to judgment as a matter of law. Contrary to the requirement of Rule 1.510, Florida Rules of Civil Procedure, Presidente No. 27's motion admitted there was an issue of fact.

Julio Martinez was using the vehicle assigned to Presidente No. 27 and was collecting shopping carts for Presidente No. 27 and Presidente No. 14. Although he was on the books as an employee of Presidente No. 14, that is not the question the trial court should have answered. The question the trial court should have answered is whether Presidente No. 27 had any control over Julio Martinez: Control is the determining factor in whether there is a principal-agent relationship, and the principal-agent relationship gives rise to vicarious liability under respondeat superior.

The evidence showed that Julio Martinez was providing services for Presidente No. 14 and Presidente No. 27, as well as for any other nearby Presidente grocery store. Julio Martinez was driving a vehicle he borrowed from Presidente No. 27. The intermingling of employees, assets, and services by Cuba Tropical and the Presidente stores

means summary judgment is inappropriate for this situation. At the very least, there is a reasonable inference that Presidente No. 27 had some control over Julio Martinez because he was using the van he borrowed from Presidente No. 27. If Presidente called Julio Martinez and told him to bring the van back, he would have to do it. Presidente No. 27 presented no evidence showing it had no control over Julio Martinez. There is also a reasonable inference that all Presidente stores in the area had control over Julio Martinez because he was collecting shopping carts for all the stores.

The trial court inappropriately made a factual finding that should be left to the jury. The final summary judgment must be reversed.

## ARGUMENT

THE TRIAL COURT IMPROPERLY ENTERED SUMMARY JUDGMENT WHERE THE QUESTION OF WHETHER JULIO MARTINEZ WAS PROVIDING SERVICES TO PRESIDENTE NO. 27 WAS SUBJECT TO DISPUTED EVIDENCE.

### A. Standard of Review

The standard of review of a final summary judgment is *de novo*. *Rodriguez v. Responsive Auto Ins. Co.*, 48 Fla. L. Weekly D1557 (Fla. 3d DCA Aug. 9, 2023)

### B. Merits

Liability for the acts of another hinge on the putative employer's right to control. As this Court explained in *Vasquez v. United Enterprises of Sw. Florida, Inc.*, 811 So.2d 759, 761 (Fla. 3d DCA 2002), "Florida courts do not use the label 'employer' to impose strict liability under a theory of respondeat superior but instead look to the employer's *control or right of control* over the employee at the time of the negligent act." (emphasis added). "The employer is liable for the negligent acts of an employee, not as if the act was done by himself, but because of the doctrine of respondeat superior—the rule of law which holds the master responsible for the negligent act of his

servant, committed while and servant is acting within the general scope of his employment and engaged in his master's business." *Univ. of Miami v. Ruiz ex rel. Ruiz*, 164 So.3d 758, 766–67 (Fla. 3d DCA 2015) quoting *Williams v. Hines*, 80 Fla. 690, 86 So. 695, 697–98 (1920).

It is against this backdrop of substantive law that the trial court was to review the motion for summary judgment and decide whether there was an issue of fact for a jury to resolve. The question of an employer/employee relationship is generally a question of fact, and therefore a question for the trier of fact. *Harper ex rel. Daley v. Toler*, 884 So.2d 1124, 1129 (Fla. 2d DCA 2004). In the motion filed by Presidente No. 27, there was no attempt to prove Presidente No. 27 had no right to control the actions of Julio Martinez. Presidente No. 27's motion attempted to disprove liability solely on the basis of which Presidente store wrote Julio Martinez's paycheck. That is an irrelevant point.

Plaintiff alleged that Julio Martinez was an employee or agent of Presidente No. 27 (R734). The essential elements of an actual agency relationship are "(1) acknowledgement by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and

(3) control by the principal over the actions of the agent." *Gillet v. Watchtower Bible & Tract Soc. of Pennsylvania, Inc.*, 913 So.2d 618, 620 (Fla. 3d DCA 2005). The element of control is therefore common to both the status of employee or agent. Again, the issue is not the label given the relationship, but the identity of those who have control.

Appellee's motion for summary judgment was based on the incorrect premise that only one person or entity may be vicariously liable for the actions of a person. That premise was based on the belief that respondeat superior applies only to employers and employees, without any consideration of control. But respondeat superior is not dictated by concepts of employment. It is defined by control. The vicarious liability of multiple employers was discussed long ago in *Postal Tel. & Cable Co. v. Doyle*, 167 So. 358, 360 (Fla. 1936):

> It is next contended that defendant cannot be held responsible for Doyle's injury because its agent, Tharon Westberry, was at the time of the accident loaned or farmed out to a third party for whom he was acting and being controlled.
>
> It is competent for a principal to loan or farm out his servant to a third party, and if such third party has complete dominion over the servant, and directs his

> conduct at all times, he will be held responsible for his derelictions even though the principal is paying his salary; but this rule does not hold good if the principal in any way withholds control over him.
>
> The evidence on this point shows that Phillips, the local manager for defendant at Daytona Beach, on the day of the accident had loaned Tharon Westberry, defendant's messenger boy, to United Press, a corporation, which was reporting the speed trials of Sir Malcolm Campbell; that at the time of the accident he was in the employ of, and was being directed by, United Press, but it is also shown that he was reporting the speed trials to defendant. In this situation the question of whose agent he was became one of fact for the jury which resolved it against the contention of plaintiff in error. Their finding finds ample support in the record.

Similarly, in this case the evidence is that the shopping carts which littered the Hialeah neighborhood where both Presidente 14 and Presidente No. 27 were located needed to be collected. Presidente No. 14 employed Julio Martinez but had no van. Presidente No. 27, on the other hand, had a van but no employee to drive it because the usual driver had the day off. It was a classic instance of two related companies sharing employees and resources to accomplish a common goal. Neither Presidente No. 14 nor Presidente No. 27 had complete control over the situation. While Presidente No. 14 had some control over Martinez as his employer, there was at least an inference that Presidente No. 27 had control over Julio Martinez

because it had control over the van Julio Martinez was driving. It could contact him to say they needed the van back and he would have to do it.

Whether and to what extent each Presidente Supermarket controlled Julio Martinez and the van is a question for the jury. *Gracia v. Sec. First Ins. Co.*, 347 So.3d 479, 482 (Fla. 5th DCA 2022) (under the new summary judgment standard, "the general rule remains intact: credibility determinations and weighing the evidence are jury functions, not those of a judge, when ruling on a motion for summary judgment").

## CONCLUSION

The trial court incorrectly entered summary judgment where the motion for summary judgment wholly failed to address the central issue of control. The trial court also appears to have decided the factual issue of whether Presidente 27 had some control over Julio Martinez. The summary final judgment must be reversed, and this case remanded for a trial.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to: **Charles M-P "Chip" George, Esq.**, Law Office of Charles M-P George, 1172 S. Dixie Hwy, Ste. 506, Coral Gables, FL 33146 (e-service@cmpg-law.com; cgeorge@cmpg-law.com); and **Jamie Clark Dixon, Esq.** and **Christopher W. Wadsworth, Esq**., Wadsworth, Margrey & Dixon, LLP, 261 N.E. 1st St., 5th FL, Miami, FL 33132 (jcd@wmd-law.org; danielleh@wmd-law.org; cw@wmd-law.org. pleadings@wmd-law.org, by email, on October 12, 2023.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.045(e) and 9.210(a)(2)(B), Appellant hereby certifies that the type size and style of the Initial Brief of Appellant is Bookman Old Style 14pt and that the word count is 2,224.

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