MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Linda L. Looney and Linda L. Looney as Personal Representative of the Estate of Joseph E. Looney,

Appellants-Plaintiffs,

v.

Nestle Waters North America, Inc.,

Appellee-Defendant.

March 31, 2022

Court of Appeals Case No. 21A-CT-2227

Appeal from the Marion Superior Court

The Honorable Cynthia J. Ayers, Judge

Trial Court Cause Nos. 49D04-2001-CT-3023 49D13-2006-CT-20393

Brown, Judge.

[1] Linda L. Looney ("Linda") and Linda L. Looney as Personal Representative of the Estate of Joseph E. Looney (the "Estate," and Linda and the Estate, together, "Plaintiffs") appeal the trial court's entry of summary judgment in favor of Nestle Waters North America, Inc. ("Nestle"). We affirm.

Facts and Procedural History

[2] At approximately 4:56 a.m. on June 22, 2018, Joseph Looney ("Joseph") was driving to work when his vehicle was struck by a vehicle operated by Aaron Henry, who was intoxicated. Joseph died as a result of his injuries. Henry had left his workplace at Nestle approximately fifteen minutes before the collision.

[3] On January 22, 2020, Plaintiffs filed a complaint against Henry under cause number 49D04-2001-CT-3023 ("Cause No. 3023"). In June 2020, Plaintiffs filed an amended complaint naming Henry and Nestle as defendants. Plaintiffs filed a Second Amended Complaint naming Henry, Nestle, and Allstate Property and Casualty Insurance Company ("Allstate") as defendants.[1] Plaintiffs alleged that Henry was intoxicated and failed to control his vehicle, causing it to go off the roadway, strike the edge of the sidewalk, go airborne, and strike Joseph's vehicle, resulting in Joseph's death. They alleged that, immediately prior to said time and place, Henry was working at Nestle, where

[1] According to the trial court's September 17, 2021 order, Plaintiffs also filed a complaint against Nestle under cause number 49D13-2006-CT-20393 asserting the same causes of action. The chronological case summary ("CCS") under Cause No. 3023 indicates that Nestle filed a "Motion to Consolidate for Purposes of Pre-Trial Proceedings, Discovery, and Trial" and that, on August 20, 2020, the court issued an "Order of Consolidation." Appellant's Appendix Volume II at 8.

he consumed intoxicating liquor. Plaintiffs alleged in part that Henry was acting within the scope of his employment and, accordingly, Nestle was vicariously liable for the negligent acts and omissions of Henry under the doctrine of respondeat superior. They alleged that Nestle breached its duty of care owed to Joseph when it allowed Henry to consume intoxicating liquors on its premises and then allowed him to operate his vehicle. Plaintiffs further alleged Nestle was negligent in hiring, training, retaining, and supervising Henry. The complaint also raised a loss of consortium claim on behalf of Linda. Henry filed an answer on July 15, 2020. Allstate was dismissed on November 13, 2020. Henry was dismissed on February 9, 2021.

[4] On February 16, 2021, Nestle filed a motion for summary judgment and designated evidence. It included Plaintiffs' answers to interrogatories, Henry's answer, the chronological case summary ("CCS") from cause number 49G05-1806-F4-20685 ("Cause No. 685"), its responses to Plaintiffs' requests for production including its Drug and Alcohol Policy, and its answers to interrogatories.

[5] Plaintiffs stated, in an interrogatory answer, that Joseph left home around 4:30 a.m. on June 22, 2018, he was sitting at a red light heading north at Emerson Avenue and Interstate 465 when his vehicle was struck at 4:56 a.m., and that he was going in to work an hour earlier than his normal shift to work overtime. In another interrogatory answer, Plaintiffs stated:

> [Henry] clocked out from his shift at Nestle at 4:40 a.m. on June 22, 2018. The car accident described in the Complaint occurred at

> approximately 4:55 a.m., just fifteen minutes after Mr. Henry clocked out from work. Mr. Henry's shift at Nestle was not scheduled to be over until 6:30 a.m., but he left work early. At 7:44 a.m., Mr. Henry's blood alcohol content was measured at .286. Mr. Henry admitted to having a verbal disagreement with a Nestle co-worker and drinking on the Nestle premises before the accident.

Appellants' Appendix Volume II at 91. In his answer, Henry admitted that he consumed alcohol prior to the accident.

[6] The CCS for Cause No. 685 indicates the State filed a charging information against Henry on June 26, 2018, that Henry pled guilty in February 2020 pursuant to a plea agreement to operating a motor vehicle with an alcohol concentration equivalent ("ACE") of .15 or more causing the death of another person as a level 4 felony, and that he was sentenced to ten years with three years suspended.

[7] The designated Nestle Drug and Alcohol Policy states: "Being under the influence of alcohol or illegally used drugs while on Company property, in Company vehicles, or while performing Company business, is prohibited." *Id.* at 119. It states: "Additionally, the consumption of alcohol on both Company property (owned or leased) or during working hours is prohibited." *Id.* It also states: "Except as otherwise provided in this Policy, any violation of this Policy will result in appropriate disciplinary action, up to and including termination of employment, and appropriate legal action." *Id.*

[8] In response to an interrogatory to "[i]dentify the Nestle . . . employee(s) with whom Henry had any argument or disagreement with during Henry's shift,"

Nestle stated "the incident described in Plaintiff's [sic] complaint did not occur at [its] Greenwood, Indiana facility" and that "it is unaware of any argument or disagreement involving Aaron Henry and his co-workers on the evening of June 21, 2018." *Id*. at 125-126. Nestle stated that "it has not received any warnings and/or complaints involving Aaron Henry with regard to alcohol consumption or intoxication on Nestle's property." *Id*. at 127. It further stated that "it is unaware of any warnings or complaints made to Nestle . . . regarding Aaron Henry's behavior while he was employed at Nestle's Greenwood, Indiana facility." *Id*. at 128. Nestle also stated that "it had no awareness of Aaron Henry consuming alcohol on its premises, and as such, had no awareness that Aaron Henry would operate his vehicle while intoxicated." *Id*.

[9] Looney filed a response in opposition to Nestle's summary judgment motion and designated evidence including Henry's answers to interrogatories[2] and a probable cause affidavit filed in Cause No. 685. In response to an interrogatory to "[l]ist each and every alcoholic beverage you consumed on the night of the Incident, including: (a) the type and size of beverage; (b) who purchased it; (c) when and where it was purchased; (d) when and where it was consumed; and (e) at what time it was consumed," Henry stated: "(a) 1 (3.4oz) bottle / 1 (750

[2] The attached copy of the interrogatory answers was not signed by Henry. Nestle filed a motion to strike arguing that Henry had not signed his interrogatory answers and the answers and the probable cause affidavit contained inadmissible hearsay. Plaintiffs filed a response stating they had been unable to obtain Henry's signature on his responses to interrogatories due to the Covid-19 visitor restrictions at the correctional facility at which he was held, they were later able to obtain his signature, and that the responses signed by Henry were attached. They also argued that an affidavit which may be inadmissible in a criminal trial may be admissible on a motion for summary judgment.

ml) Smirnoff vodka (b) Aaron Henry (c) Superior Beverage Greenwood IN, on night of 06/21/2018 (d) and (e) consumed about 3 AM the morning of 06/22/2018 in vehicle during last break of work in parking lot . . . ." *Id*. at 186. In response to an interrogatory to "[e]xplain where you went and what you were doing for the eight (8) hours prior to the Incident," Henry stated: "Was at Nestle . . . Greenwood In . . . Driving forklift and had verbal disagreement with co-worker and walked away to go to car and drink travel size alcohol (3.4 oz) about midnight of 06/22/2018." *Id*. at 188.

[10] The probable cause affidavit filed in Cause No. 685 stated that blood was drawn from Henry at 7:44 a.m. and that the Marion County Crime Lab reported that his blood contained an alcohol concentration of .286 grams of alcohol per 100 milliliters of his blood. The affidavit further stated that a witness observed Henry's vehicle "was airborne" as it went past him and struck the driver's side of Joseph's vehicle. *Id*. at 151. The affidavit also stated that a police officer at the scene of the collision could smell a strong odor of an alcoholic beverage on Henry's breath, Henry's speech was so slow and slurred that the officer could not understand him on the few occasions he replied to questions, his eyes were very red and watery, and he had a difficult time keeping his eyelids open while attempting to look at the officer.

[11] On August 5, 2021, the court held a hearing. On September 17, 2021, the trial court entered an order denying Nestle's motion to strike and granting its motion for summary judgment. With respect to the motion to strike, the court found that Henry re-executed his interrogatory responses and thus any error was cured

and that the probable cause affidavit was admissible.[3] The court found that summary judgment in favor of Nestle was warranted on Plaintiffs' claim that Nestle was vicariously liable for the acts or omissions of Henry. With respect to Plaintiffs' claim that Nestle was negligent in hiring, training, retaining, and supervising Henry, the court referred to Restatement (Second) of Torts, § 317, and found that Nestle did not owe a duty of care to Joseph to control Henry's secret consumption of alcohol on its premises. Further, the court noted that the foreseeability of the injurious event must also be examined and found:

> In this circumstance, Nestle hired Henry to work in its Greenwood, Indiana facility. Nestle did not require that Henry drive a vehicle on public roadways as part of his duties at Nestle. He was not given a company vehicle nor was he required to do Nestle's work off premises. They did not provide alcohol to Henry while he was on Nestle's premises, such as when an employer hosts a social event with alcohol available for their employees. [T]he use or consumption of alcohol was explicitly prohibited during working hours and on company property. Because Henry's consumption of alcohol and his subsequent level of intoxication was unknown to Nestle and because the accident occurred off premises of the Greenwood, Indiana location, [Joseph] was not a reasonably foreseeable victim injured by a reasonably foreseeable harm. Nestle did not owe a duty of care to [Joseph] as a matter of law.

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[3] We note "an affidavit that would be inadmissible at trial may be considered at the summary judgment stage of the proceedings if the substance of the affidavit would be admissible in another form at trial." *Reeder v. Harper*, 788 N.E.2d 1236, 1241-1242 (Ind. 2003). To the extent the probable cause affidavit or its statement about information received from the Marion County Crime Lab constituted inadmissible hearsay, we cannot say the evidence including Henry's blood alcohol concentration would not be admissible in another form at trial. We do not disturb the court's denial of Nestle's motion to strike.

Id. at 25. The trial court entered summary judgment in favor of Nestle on all of Plaintiffs' claims.

Discussion

[12] The issue is whether the trial court erred in entering summary judgment in favor of Nestle. Our standard of review is the same as it is for the trial court. *Manley v. Sherer*, 992 N.E.2d 670, 673 (Ind. 2013). The moving party bears the initial burden of making a prima facie showing there are no genuine issues of material fact and it is entitled to judgment as a matter of law. *Id*. If the moving party carries its burden, then the non-moving party must come forward with evidence establishing the existence of a genuine issue of material fact. *Id.* The trial court's grant of a motion for summary judgment is cloaked with a presumption of validity. *Hayden v. Franciscan Alliance, Inc.*, 131 N.E.3d 685, 690 (Ind. Ct. App. 2019), *trans. denied*.

[13] Plaintiffs argue the trial court erred in entering summary judgment with respect to their claim that Nestle was negligent in hiring, training, retaining, and supervising Henry.[4] Nestle maintains that "the uncontroverted evidence establishes [it] had no awareness of Mr. Henry surreptitiously consuming his

[4] Plaintiffs "do not contend that Nestle is responsible for Mr. Henry's acts under the doctrine of respondeat superior." Appellant's Brief at 11. An employer may be subject to vicarious liability for a tort committed by its employee acting within the scope of employment under the doctrine of respondeat superior. *See Barnett v. Clark*, 889 N.E.2d 281, 283-284 (Ind. 2008). "Negligent retention and supervision is a distinct tort from respondeat superior." *Cruz v. New Centaur, LLC*, 150 N.E.3d 1051, 1059 (Ind. Ct. App. 2020) (internal quotations and citations omitted).

own alcohol in his personal car on its premises in violation of its policy." Appellee's Brief at 12.

[14] Negligence claims have three elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) injury to the plaintiff proximately caused by the defendant's breach. *Hayden*, 131 N.E.3d at 693. A defendant is entitled to summary judgment by demonstrating that the undisputed material facts negate at least one element of the plaintiff's claim. *Miller v. Rosehill Hotels, LLC*, 45 N.E.3d 15, 19-20 (Ind. Ct. App. 2015).

[15] Indiana recognizes the tort of negligent hiring, retention, and supervision of an employee. *Hayden*, 131 N.E.3d at 693. Indiana has adopted the Restatement (Second) of Torts § 317 ("Section 317"), which provides:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and

> (ii) knows or should know of the necessity and opportunity for exercising such control.[5]

[16] The collision did not occur on Nestle's premises, and Henry was not using a chattel of Nestle. Nestle did not owe a duty to Joseph within the meaning of Section 317.

[17] Although the specific test included in Section 317 is part of the inquiry, our analysis does not end there. *See Clark v. Aris, Inc.*, 890 N.E.2d 760, 763 (Ind. Ct. App. 2008), *trans. denied*. In addition, there are general rules and concepts surrounding the imposition of a duty that must also be satisfied. *Robbins v. Trustees of Ind. Univ.*, 45 N.E.3d 1, 12 (Ind. Ct. App. 2015) (citing *Clark*, 890 N.E.2d at 763). In determining whether to impose a duty of care, three factors must be considered: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns. *Id.* (citing *Clark*, 890 N.E.2d at 763 (citing *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991))). Imposition of a duty is limited to those instances where a reasonably foreseeable victim is injured by a reasonably foreseeable harm. *Id.* (citing *Clark*,

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[5] Comment b. to Section 317 provides in part:

> [T]he master as such is under no peculiar duty to control the conduct of his servant while he is outside of the master's premises, unless the servant is at the time using a chattel entrusted to him as servant. Thus, a factory owner is required to exercise his authority as master to prevent his servants, while in the factory yard during the lunch hour, from indulging in games involving an unreasonable risk of harm to persons outside the factory premises. He is not required, however, to exercise any control over the actions of his employees while on the public streets or in a neighboring restaurant during the lunch interval, even though the fact that they are his servants may give him the power to control their actions by threatening to dismiss them from his employment if they persist.

890 N.E.2d at 764 (citing *Webb,* 575 N.E.2d at 995)). Whether a duty exists is ordinarily a question of law. *Id*.

[18] "When foreseeability is part of the duty analysis . . . foreseeability is a general threshold determination that involves an evaluation of (1) the broad type of plaintiff and (2) the broad type of harm." *Rogers v. Martin*, 63 N.E.3d 316, 325 (Ind. 2016). "[T]his foreseeability analysis should focus on the general class of persons of which the plaintiff was a member and whether the harm suffered was of a kind normally to be expected—without addressing the specific facts of the occurrence." *Id.* "[T]his analysis comports with the idea that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists.'" *Id.* (citation and internal quotations omitted).

[19] Here, the designated evidence establishes that Henry clocked out at 4:40 a.m., drove his vehicle while intoxicated, and struck Joseph's vehicle at approximately 4:56 a.m. Henry was intoxicated and pled guilty to operating a motor vehicle with an ACE of .15 or more causing the death of another person as a level 4 felony. The court found Nestle did not require that Henry drive a vehicle on public roadways, give him a company vehicle, or provide him with alcohol. Henry indicated that he walked to his vehicle to consume a "travel size alcohol (3.4 oz) about midnight" and that he consumed vodka "about 3 AM the morning of 06/22/2018 in vehicle during last break of work in parking lot." Appellant's Appendix Volume II at 186, 188. Nestle had a written Drug and Alcohol Policy which prohibited being under the influence of alcohol while on its property or while performing company business and which prohibited the

consumption of alcohol during working hours. Moreover, Nestle designated evidence that it had "not received any warnings and/or complaints involving Aaron Henry with regard to alcohol consumption or intoxication on [its] property" and "had no awareness of Aaron Henry consuming alcohol on its premises, and as such, had no awareness that Aaron Henry would operate his vehicle while intoxicated." *Id*. at 127-128. We note Plaintiffs did not designate evidence showing that Henry's co-workers or supervisors observed that Henry displayed signs of intoxication while at the Nestle facility at or around the time he clocked out, observed or were aware that he had consumed alcohol during his shift, or were aware that he consumed alcohol during work hours on previous occasions.

[20] Under these circumstances, we conclude that Joseph was not a reasonably foreseeable victim injured by a reasonably foreseeable harm. Further, on these facts, we do not believe public policy weighs in favor of imposing a duty on Nestle for Henry's conduct, where it was unaware of his conduct, which was in violation of its workplace policies, and his subsequent illegal operation of his vehicle while intoxicated. The trial court did not err in entering summary judgment in favor of Nestle.

[21] For the foregoing reasons, we affirm the trial court.

[22] Affirmed.

May, J., and Pyle, J., concur.