COURT OF APPEALS
DECISION
DATED AND RELEASED

September 11, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0556

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CARL STEVENSON,

PLAINTIFF-APPELLANT,

v.

J. F. BRENNAN COMPANY, INC., AND WAUSAU UNDERWRITERS INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Carl Stevenson appeals from a summary judgment dismissing his personal injury claim against J. F. Brennan Company, Inc. (JFB) and its insurer. Stevenson was injured in a barge cleaning accident while employed by Brennan Marine, Inc. (BMI), a corporation which is linked to JFB by

common ownership, but which is engaged in a separate and distinct business. The accident was allegedly caused by the negligence of Kenneth Steiber, a long-time employee of JFB who had temporarily worked on the BMI barge cleaning project for two and one-half months. Stevenson sued JFB as Steiber's employer, and directly for its alleged negligence in training Steiber. The dispositive issues are (1) whether evidence submitted on summary judgment established that Steiber was a loaned employee of BMI, thereby removing JFB's liability for his acts while working on BMI's project; and (2) whether that evidence also required dismissal of the direct claim against JFB for negligently training Steiber in the duties he was performing at the time of Stevenson's injury. We conclude that the evidence requires dismissal as a matter of law. We therefore affirm.

Stevenson initially sued BMI. He then belatedly learned of Steiber's relationship to JFB, as its long-time employee, and amended his complaint to include JFB as a defendant. The case against BMI was subsequently dismissed, in an order that is not challenged on appeal. At issue, instead, is the trial court's subsequent judgment dismissing the complaint against JFB and its insurer, on the merits and on statute of limitations grounds as well.

Summary judgment is appropriate if the material facts are undisputed, only one reasonable inference is available from those facts, and that inference requires judgment for a party as a matter of law. ***Wagner v. Dissing***, 141 Wis.2d 931, 939-40, 416 N.W.2d 655, 658 (Ct. App. 1987). We independently decide this issue without deference to the trial court. ***Schaller v. Marine Nat'l Bank***, 131 Wis.2d 389, 394, 388 N.W.2d 645, 648 (Ct. App. 1986).

Under the loaned employee rule, the borrowing employer becomes the party solely liable in *respondeat superior* if (1) the employee actually or

impliedly consented to work for the borrowing employer; (2) the employee performed the borrowing employer's work at the time of the injury; (3) the borrowing employer had the right to control the details of the work being performed; and (4) employee's work was primarily for the benefit of the borrowing employer. ***Meka v. Falk Corp.***, 102 Wis.2d 148, 151, 306 N.W.2d 65, 68 (1981). Here, Stevenson concedes the second and fourth elements, but contends that material disputes remain as to whether Steiber consented to work for BMI, and whether BMI had the right to control the details of the work he performed.

The undisputed evidence shows that Steiber consented to work for BMI. Steiber and all other involved persons testified that Steiber actually and willingly agreed to work on BMI's project. Even if he did not, as Stevenson asks us to infer from the inherently coercive nature of employer/employee relationships, other factors establish an eventual implied consent. In ***Meka***, 102 Wis.2d at 156, 306 N.W.2d at 70, the supreme court identified several factors that, combined, establish implied consent as a matter of law. These include the fact that the employee knew that his work benefited the borrowing employer, that he had worked for the borrowing employer for many weeks, that he was subject to a high degree of control and supervision as to actual work done, that he worked on the borrowing employer's premises at that employer's regular business, that the loaning employer had no control or right to control the nature of the work performed by the employee and the borrowing employer had the right to remove the employee from further work. ***Id***. Those same factors are present and undisputed in this case. Seiber's implied, if not actual, consent to his employment at BMI is therefore not subject to reasonable dispute.

The evidence also establishes that BMI controlled the details of Steiber's work for BMI. Steiber was laid off from JFB at a time when BMI needed his services on its barge cleaning project. Once Steiber began work for BMI, there is no evidence that he had any further contact with anyone at JFB until after Stevenson's injury, creating the inference that not only did JFB have no control over Steiber, but no particular interest in what he was doing. Although he continued on the JFB payroll, BMI reimbursed JFB dollar for dollar for his salary and benefits. Additionally, we do not infer JFB control because Steiber was operating a JFB owned crane on the BMI premises. The undisputed evidence showed that the crane was rented from JFB separately, and that BMI would have rented a crane elsewhere if the price had been cheaper. In other words, there is no evidence that JFB assigned Steiber to the BMI work site in order to care for and properly operate its crane. In contrast to JFB's lack of control over Steiber, a BMI officer directly supervised him. While that supervision was not on site, Steiber received instructions every day and sometimes several times a day, over the phone.

The undisputed evidence also requires dismissal of Stevenson's direct claim against JFB for its negligent training of Steiber. Stevenson alleged that Steiber negligently caused his injury when he "began the process of lifting a barge cover [with the crane] without first receiving the appropriate hand signal that it was safe to do so." According to Stevenson, that allegation implicates JFB because it negligently failed to train Steiber to use only hand signals as opposed to head signals while operating a crane. However, if improper signals were used in the crane operations at BMI's work site, that can only be BMI's responsibility. Regardless of the training and procedures implemented during Steiber's tenure at JFB, BMI had the authority to impose whatever safety procedures it wished to at

its work site. Steiber and his supervisor at BMI, in their depositions, agree that signaling and other safety procedures were discussed when Steiber came to work for BMI. JFB cannot reasonably be held liable if those discussions did not produce an appropriate signaling system.

Our decision makes it unnecessary to address whether Stevenson commenced this action after the applicable statute of limitations had expired. Even if the action was timely, the undisputed evidence on the merits requires judgment for JFB.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5., STATS.