COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2407 **Cir. Ct. No. 2014CV288**

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

DIANE FLORES,

PLAINTIFF-APPELLANT,

ARTERO FLORES,

PLAINTIFF,

V.

THE CINCINNATI INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS AND DODGE COUNTY ANTIQUE POWER CLUB,

DEFENDANTS.

APPEAL from an order of the circuit court for Dodge County: STEVEN G. BAUER, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Seidl, JJ.

¶1 PER CURIAM. Diane Flores appeals a circuit court order granting summary judgment in favor of Dodge County Antique Power Club, a nonprofit organization, and its insurer, The Cincinnati Insurance Company, in this personal injury case. For the reasons set forth below, we affirm the order of the circuit court.

BACKGROUND

¶2 Flores was injured while working as part of an inmate project crew assigned to work on Club grounds pursuant to a contract between the Club and the Department of Corrections (DOC). At the time of her injury, Flores was an inmate at the DOC's John C. Burke Correctional Center. Mari Anderson, another inmate assigned to the project crew, accidentally struck Flores in the head with a plastic barrel while moving the barrels from a trailer to a shed. Flores filed a complaint against the Club and its insurer, alleging that the Club was vicariously liable for Anderson's negligence, that the Club failed to properly supervise and manage its agents in the moving of the barrels, and that the Club failed to maintain a safe workplace, in violation of WIS. STAT. § 101.11 (2015-16).[1] The Club and its insurer filed a motion for summary judgment, and the circuit court granted the motion after a hearing. Flores now appeals.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

STANDARD OF REVIEW

¶3 This court reviews summary judgment decisions de novo, applying the same legal standard and methodology employed by the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. Summary judgment is appropriate when "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***Kruschke v. City of New Richmond***, 157 Wis. 2d 167, 169, 458 N.W.2d 832 (Ct. App. 1990).

DISCUSSION

¶4 Flores argues on appeal that a master/servant relationship existed between Anderson and the Club, such that the Club should be held vicariously liable for Flores's injury. Flores further argues that the Club breached a contractual duty to properly train and supervise its agents in the unloading of the barrels. She does not challenge the circuit court's ruling that WIS. STAT. § 101.11, the safe workplace statute, does not apply under the circumstances. Therefore, we do not address that issue here.

Vicarious liability

¶5 In order to succeed on her claim of vicarious liability on the part of the Club, Flores would first need to establish the existence of a master/servant relationship between the Club and the inmates. *See* ***Kerl v. Dennis Rasmussen, Inc.***, 2004 WI 86, ¶18, 273 Wis. 2d 106, 682 N.W.2d 328 (prerequisite to vicarious liability under the doctrine of respondeat superior is the existence of a master/servant relationship). A "master" is "a principal who employs an agent to perform service in his affairs and who controls or has the right to control the

physical conduct of the other in the performance of the service." ***Id.***, ¶19 (quoting Restatement (Second) of Agency, § 2(1)). The Club counters that it cannot be held vicariously liable for Anderson's actions because the record does not show that any master/servant relationship existed between Anderson and the Club.[2] For the reasons discussed below, we agree with the Club.

¶6 Flores asserts that Anderson was an agent/servant of the Club, pursuant to the contract between the Club and the DOC. The contract consists of several documents, including a Project Crew Checklist. In support of her argument that the Club controlled or had the right to control the inmates, Flores refers to Paragraphs 6 and 9 under the checklist section entitled "RESPONSIBILITIES OF AGENCY." Paragraph 6 states that the agency (here, the Club) will "[p]rovide inmates assigned to Agency project crews with the training needed to perform assigned tasks, to include health and safety requirements of the agreed assignment(s)." Paragraph 9 states that, for "Agency supervised project crews," the agency will "provide supervision of inmates to include visual confirmation of all inmates at least once every 30 minutes."

¶7 We turn first to Paragraph 9 because Flores's argument with respect to that paragraph is most quickly disposed of. The clause in Paragraph 9 is conditional, applying only to project crews supervised by the agency—in this case, the Club. Nothing in the record suggests, and the parties do not argue, that the project at issue was an agency supervised project, as that term is used in the

[2] The Club also argues that Anderson was an independent contractor, and not its servant or employee. We need not address this argument, in light of the flaws in Flores's other arguments that dispose of the issues on appeal. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (we need not address all issues when deciding case on other grounds).

contract, nor is there any contractual provision requiring the Club to supervise the inmates. In addition to the checklist, the agreement between the DOC and the Club also consists of a Project Crew Information Sheet and a Community Site Assessment. On the Community Site Assessment sheet, the box provided under the phrase "WHAT IS THE EXTENT OF ON-SITE SUPERVISION OF INMATE" is filled in with the words "inmates supervised by DOC SGT." This provision, combined with the lack of any evidence in the record that the Club was responsible for supervising the inmates, confirms that the work done at the Club was not an agency supervised project. Paragraph 9 is, therefore, inapplicable under the circumstances.

¶8 We turn next to Flores's argument that Paragraph 6 of the checklist, which states that the Club will provide "the training needed," demonstrates that the Club had control or the right to control the inmates. Flores does not provide any authority for the proposition that training, or the right to train, in itself establishes a master/servant relationship giving rise to vicarious liability. In addition, nothing in the record suggests that any training was, in fact, needed or provided with respect to the work done by the project crew on Club grounds. The work assigned to the inmates was a simple task of loading and unloading plastic barrels, for which no special training was required. Flores attempts to create ambiguity on this issue by citing the testimony of Club volunteer Leslie McCollough, who stated, "We would demonstrate what we needed done, and then we would let them do it." Flores also cites her own testimony that, when she was loading barrels on the day of the accident, McCollough at one point told her that he wanted the barrels placed on their sides, instead of standing straight up. However, Flores does not establish any causal relationship between McCollough's

direction and Anderson's removal of the barrels in a way that caused injury to Flores.

¶9 Moreover, the type of general guidance given by McCollough is not inconsistent with our conclusion, based on the record, that it was the DOC, through correctional officer Sergeant Staci Trainor, that was in control of the inmates at all times while they were on Club grounds. Although McCollough may have led by example or made statements to the inmates about how the Club wanted things done, he never testified that he had the authority to tell the inmates where to go or that they were required to follow his directions. On the contrary, Trainor testified that she was the sole person in charge of the inmates on the project crew on the day of the accident. Trainor's testimony reflects that she had the ultimate veto power over the activities that a site might ask the inmates to do and, if she felt an activity was unsafe, she would not let the inmates do it.

¶10 Flores testified that the DOC provided transportation to and from the various sites where the project crews worked, including the Club grounds. The DOC also provided lunches to the inmates, who would eat at the work site. Flores testified that, while on a project crew, the inmates were never allowed out of the sight of the corrections officer who, in Flores's case, was always Trainor. Trainor worked along with the inmates, told them what to do, and had the ability to stop them from performing work at any time. Flores understood Trainor to be her boss and testified, "We just listen to Sergeant Trainer [sic]. We don't listen to anybody else."

¶11 Based on the above undisputed facts, we conclude that the DOC, through Sergeant Trainor, supervised and controlled the inmates in their work on the Club grounds. Accordingly, no reasonable jury could return a verdict that the

Club was vicariously liable for Flores's injuries, such that summary judgment was properly granted in favor of the Club and Cincinnati Insurance. *See* ***Baxter v. WDNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (no genuine issue of material fact exists where the evidence is not such that a reasonable jury could return a verdict for the nonmoving party).

Breach of contractual duty

¶12 Flores also argues on appeal that the Club breached a contractual duty to properly train and supervise the unloading of the barrels, resulting in injury to Flores. The only legal authority Flores cites in support of this argument is, generally, ***Kerl***, 273 Wis. 2d 106. ***Kerl*** is not persuasive in this context. The plaintiff in ***Kerl*** had alleged breach of contract, as a third party beneficiary, in his complaint. ***Id.***, ¶13. The circuit court dismissed the plaintiff's breach of contract claim. ***Id.***, ¶14. The supreme court stated specifically in its opinion that the contract claim was not before it on appeal. ***Id.***, ¶15 n.1. Flores's reliance on ***Kerl*** in the contractual context is, therefore, misplaced.

¶13 In any event, Flores was not a party to the contract between the Club and the DOC. The only possible way Flores could seek recovery for a breach of that contract would be if she were a third party beneficiary. A person claiming to be a third party beneficiary must show that the contract was entered into by the parties to the contract directly and primarily for the benefit of the third party. ***Pappas v. Jack O. A. Nelsen Agency, Inc.***, 81 Wis. 2d 363, 370, 260 N.W.2d 721 (1978). An indirect benefit incidental to the contract is not sufficient. ***Id.*** There is nothing in the contract between the Club and the DOC indicating that the inmates were an intended third party beneficiary, and Flores does not make such

an assertion. Therefore, as a matter of law, the Club is not liable for breach of contract, and summary judgment was appropriate.

By the Court.—Order affirmed.

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