COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1624 **Cir. Ct. No. 99CV9910**

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

LOLA M.,

PLAINTIFF-APPELLANT,

V.

CITY OF MILWAUKEE,

DEFENDANT-RESPONDENT,

PEDRO ENRIQUE-GAITAN,
MILWAUKEE POLICE
DEPARTMENT AND ABC
INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Lola M. appeals from the circuit court judgment dismissing her claims against the City of Milwaukee, based on the court's written decision determining that the City was entitled to summary judgment. She argues that the court erred in concluding that the scope-of-employment issue she raised was appropriate for determination by summary judgment rather than by submission to a jury. She also argues that the court erred in dismissing her additional claim, under 42 U.S.C. § 1983, that the City violated her civil rights. We affirm.

I. BACKGROUND

¶2 L.M. brought the underlying action against the City as a result of City of Milwaukee Police Officer Pedro Enrique-Gaitan's sexual assault of her.[1] For the purpose of the circuit court's review of the City's motion for summary judgment on the scope-of-employment issue, the parties submitted the case to the court on stipulated facts.

¶3 Those facts established that, on November 2, 1997, Enrique-Gaitan was working as a City of Milwaukee police officer when he pulled over L.M. for a traffic stop. After Enrique-Gaitan examined L.M.'s driver's license, informed her that her license plates were suspended and would need to be removed from the car, and allowed her to see her identifying information on the computer in his squad car, he instructed her to return to her car and follow him. He drove to the rear of

[1] L.M. originally filed her complaint against Enrique-Gaitan and ABC Insurance Company only; she added the City of Milwaukee and the Milwaukee Police Department as defendants over four months later.

Enrique-Gaitan was criminally prosecuted for his sexual assault of L.M.; this court affirmed his conviction. *See* ***State v. Enrique-Gaitan***, No. 99-1670-CR, unpublished slip op. (Wis. Ct. App. July 5, 2000), *review denied*, 2000 WI 121, 239 Wis. 2d 310, 619 N.W.2d 93.

two commercial buildings and parked his vehicle. After L.M. parked her car behind his, he "beckoned to her to come into [his] squad" and, after she entered the squad car, Enrique-Gaitan "grabbed [her] by the neck, pulled her very roughly over to him, and started kissing her on the mouth in [a] very rough manner." He also "forced [L.M.] to touch his penis through his clothing." After L.M. returned to her car, Enrique-Gaitan entered it and again "grabbed her by the neck and pulled her close to him and started kissing her on the mouth in a rough manner." Then he "grabbed her hand and pulled it over his penis on top of his clothing, placed her hand on his penis, and started rubbing his penis with her hand," and subsequently "grabbed her breast and fondled it in a very rough manner," and, after she pulled her hand away, "started rubbing his hand in between her legs, rubbing his finger over her vaginal area."

¶4 The stipulated facts also established that on October 28, 1997, a man went to a City of Milwaukee police station and reported that, earlier on October 28, his girlfriend, a college security guard, was in Enrique-Gaitan's squad car when he "grabbed her hand." On October 30, 1997, two police sergeants interviewed the security guard who told them that, on several occasions, Enrique-Gaitan had "propositioned" her or "followed her and, on one occasion, may have been attempting to forcibly have her touch his genital area."

¶5 The stipulation also provided that the Milwaukee Police Department "has a specific policy prohibiting its officers from making unwelcome sexual advances or in any other way sexually harassing individuals, and specifically prohibits officers from requesting sexual favors or from engaging in verbal or physical conduct of a sexual nature."

¶6 Granting summary judgment, the circuit court, in its written decision, declared:

> Based on the undisputed facts, … and on the language of ***Olson*** [***v. Connerly***, 156 Wis. 2d 488, 457 N.W.2d 479 (1990)], this court concludes, as a matter of law, that defendant's tortious conduct was not motivated in any way by a purpose to serve his employer. From the undisputed facts, there is no indication defendant was intending to carry out his employment when he committed the tortious acts complained of. This is particularly true given the [Milwaukee Police Department] policy which prohibits such conduct. In fact, as the City notes, defendant's conduct actually undermines the City's interests.

And specifically with respect to L.M.'s claim under 42 U.S.C. § 1983, the court further declared:

> Plaintiff has put forth no evidence or argument to demonstrate that the City's policies regarding sexual harassment violated her constitutional rights. Moreover, plaintiff has not demonstrated that the City acted with "deliberate indifference." In this case, the [Milwaukee Police Department] had only one prior complaint, which [it] had begun investigating, and which occurred less than one week prior to the conduct complained of here. On this record, it cannot be said that any alleged failure to train or supervise defendant was so obvious and so likely to result in a violation of plaintiff's constitutional rights that the City can be said to have acted with "deliberate indifference."

II. DISCUSSION

¶7 The often-recited standards governing the determination of summary judgment are well known and need not be detailed here. Briefly, summary judgment methodology is used to determine whether a legal dispute requires a trial. ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis. 2d 80, 86, 440 N.W. 825 (Ct. App. 1989). A circuit court must enter summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (1999-2000).[2] While summary judgment is a "drastic remedy," it is appropriately granted when the material facts are undisputed and "no competing inferences can arise, and the law that resolves the issue is clear." ***Lecus v. Am. Mut. Ins. Co. of Boston***, 81 Wis. 2d 183, 189, 260 N.W.2d 241 (1977). We review a trial court's summary judgment determination *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Here, we conclude that no competing inferences can arise from the stipulated facts, and that the law resolving the issues is clear.

A. Scope of Employment

¶8 Whether an employee was acting within the scope of employment may be determined on summary judgment. ***Estate of Murray v. Travelers Ins. Co.***, 229 Wis. 2d 819, 831, 601 N.W.2d 661 (Ct. App. 1999). "[A]n employee's conduct is not within the scope of his or her employment if it is too little actuated by a purpose to serve the employer or if it is motivated entirely by the employee's own purposes (that is, the employee stepped aside from the prosecution of the employer's business to accomplish an independent purpose of his or her own)." ***Olson***, 156 Wis. 2d at 499-500. Here, we conclude that the circuit court correctly determined that Enrique-Gaitan's assault of L.M. was outside the scope of his employment.

¶9 L.M. submits that "[t]he issue in this case is really one of procedure, asking whether a court or jury should answer the factual question of whether or

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

not the officer's conduct was actuated, at least in part, by a purpose to serve the employer." She reasonably suggests that the question is "one of degree: how much must an employee deviate from the employer's (pure) purpose before the employee is no longer within the scope of his employment." She argues that if this court "steps back and looks at the context of the tort herein in its entirety[,] … it becomes evident that this was a chain of interdependent, interwoven events, of which the sexual assault and sexual battery were linked with conduct meant to serve the purpose of the employer." Although we accept L.M.'s theoretical premise—that the question is one of degree—we reject her contention that Enrique-Gaitan's assaultive behavior was linked to some service of the City.

¶10 L.M. presents a lengthy argument that, in effect, dissects Enrique-Gaitan's conduct in order to demonstrate that some of his actions were within the scope of his employment. She refers, for example, to his questioning of her regarding her suspended license plates, and to his display of the squad car computer indicating her previous address. In doing so, however, L.M. fails to follow her own good advice to this court—to "step[] back and look[] at the context." The fact that, in the course of his improper conduct, Enrique-Gaitan did certain things that, in isolation, were within the scope of employment is no more significant than the fact that, indeed, a broken clock tells the correct time twice each day.

¶11 In ***Olson***, the supreme court reiterated that "[t]he scope[-]of[-] employment cases of this court have always deemed significant the employee's intent at the time the acts in question were committed." ***Olson***, 156 Wis. 2d at 497-98. Obviously, in assaulting L.M., Enrique-Gaitan was intending to serve himself, not the City; he "stepped aside from his employer's business to achieve an independent purpose of his own." *See* ***id.*** at 501. Although Enrique-Gaitan

encountered L.M. while working, his assault of her was, unquestionably, not "actuated by an intent to serve his employer." *See* ***id.***

¶12 Thus, as the circuit court concluded, when Enrique-Gaitan assaulted L.M., he was acting outside the scope of his employment and, therefore, summary judgment was appropriate. *See* ***Block v. Gomez***, 201 Wis. 2d 795, 805, 549 N.W.2d 783 (Ct. App. 1996) ("[F]or a court … to rule as a matter of law that an employee's conduct fell outside the scope of employment, the evidence presented must support only that conclusion.").

B. 42 U.S.C. § 1983

¶13 L.M. also briefly argues that the circuit court erred in dismissing her 42 U.S.C. § 1983 claim. She contends that because the City had received a complaint of Enrique-Gaitan's sexual assault of another woman, its "failure to engage in any affirmative act to discourage [him] from again assaulting another woman" enabled him to assault her while he was on duty, and thus is evidence of its "deliberate indifference" regarding her civil rights. She maintains:

> The City could have suspended the officer with pay; it could have transferred him (temporarily) to a desk job; it could have added a partner to his patrol. Yet, the City decided to "investigate" while its officer, already accused of serious sexual misconduct while in uniform, continued on the streets. Even if the [C]ity would have **merely notified** Enrique-Gaita[]n that it was **investigating him**, it probably would have deterred him for the period of the investigation. Instead the City did nothing.

¶14 It is undisputed that the City had received a prior complaint of Enrique-Gaitan's improper conduct against another woman. That complaint, however, came only days before the incident involving L.M. According to the stipulated facts, the complaint was investigated two days after it was received but,

by the time of the L.M. assault, the investigation had not advanced to the point where the City had more directly intervened. The facts offer nothing to suggest that the City was deliberately indifferent to any allegations of misconduct.

¶15 "A claim of negligence in … supervising employees does not state a cause of action under sec. 1983. For such a claim to be actionable under the federal act, the failure to supervise … must be so severe that it shows 'gross negligence' or 'deliberate indifference.'" ***Kimpton v. Sch. Dist. of New Lisbon***, 138 Wis. 2d 226, 238, 405 N.W.2d 740 (Ct. App. 1987) (citations omitted). "To rise to the level of 'gross negligence' or 'deliberate indifference' the evidence must show that the [City's] 'supervisory officials knew or should have known that [the employee was] engaging in unconstitutional conduct, and they failed to take remedial action.'" ***Id.*** at 239 (quoting ***Starstead v. City of Superior***, 533 F. Supp. 1365, 1371 n.5 (W.D. Wis. 1982)). Thus, even if we could accept L.M.'s implicit premise that the City's "supervision"—its response to the prior complaint against Enrique-Gaitan—was negligent, nothing in the facts would establish "gross negligence" or "deliberate indifference." Accordingly, we conclude that the trial court correctly granted summary judgment dismissing the § 1983 claim.

By the Court.—Judgment affirmed.

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