COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2910 **Cir. Ct. No. 2005CV61**

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

KENNETH J. BEHRENDT,

PLAINTIFF-APPELLANT,

V.

GULF UNDERWRITERS INSURANCE CO. AND SILVAN INDUSTRIES, INC.,

DEFENDANTS-RESPONDENTS,

AUTO OWNERS INSURANCE CO., PETER HARDING, CINCINNATI INSURANCE CO., W.D.M. ENTERPRISES OF MARINETTE, WI AND JAMES E. FISHER,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. Kenneth Behrendt appeals a summary judgment dismissing his negligence claims against Silvan Industries, Inc., and its insurer, Gulf Underwriters Insurance Co. Behrendt contends issues of material fact preclude the summary judgment. We conclude that co-defendant James Fisher[1] was not working within the scope of his employment at Silvan when he built the tank at issue in this case, precluding any theory of vicarious liability against Silvan for Fisher's negligence. We further conclude the harm in this case was unforeseeable, barring a negligence claim as a matter of law. Accordingly, we affirm the judgment.

Background

¶2 Silvan manufactures "pressure vessels," which are tanks designed to be used under pressure. It also has a company policy allowing employees to use scrap metal and company tools to make items for personal use. These items have included a wide variety of items such as Christmas tree stands, barbecue grates, and plant stands.

¶3 In approximately 1994,[2] Silvan employee James Fisher took advantage of Silvan's policy in order to fabricate a large tank for his son-in-law, Dan Linczeski. Linczeski was the owner of Dan's Faster Lube, an oil change business, and he had asked Fisher for a tank to collect drained oil. Fisher asked fellow employee and welder Rex Sommers for assistance in making the tank.

[1] Fisher's name is also spelled Fischer at multiple places in the record and in Behrendt's brief. We use Fisher because that is how the case has been captioned in this court.

[2] The exact date is not clear, but Dan Linczeski estimated this date to be approximately ten years preceding Behrendt's injury in 2004.

When Linczeski received the tank, it had more holes in it than he needed. He contacted Peter Harding, who was not a Silvan employee, and asked him to make some modifications to the tank.

¶4 After the modifications were made, Linczeski applied pressure to the tank, using air pressure to force collected oil from the tank into other holding tanks. There is considerable dispute as to whether Fisher knew Linczeski wanted a pressure vessel, whether Linczeski told Harding he planned to use air pressure with the tank, whether Harding advised against it, and other similar facts. However, it is undisputed is that the tank was not actually designed to be used under pressure. The tank exploded in 2004 and injured Behrendt, Linczeski's employee.

¶5 Behrendt sued Fisher, Silvan, Harding, and Harding's employer, along with various insurance companies, alleging negligence against all the parties and further alleging strict liability and vicarious liability against Silvan. Fisher, Silvan, Harding, and Harding's employer all moved for summary judgment. Behrendt agreed to dismiss the claims against Harding's employer. The court denied Fisher's and Harding's motions, but granted Silvan's. The court concluded there could be no strict liability against Silvan because it did not manufacture the tank. It further concluded that even if Silvan were negligent, the negligence was too remote from the injury and public policy therefore precluded any award. Behrendt appeals the portion of the summary judgment dismissing the negligence claim against Silvan; the strict liability dismissal is not at issue on appeal.

Discussion

¶6 We review summary judgments de novo, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d

304, 315-17, 401 N.W.2d 816 (1987). The methodology is well-established. *See, e.g.,* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. On appeal, Behrendt asserts summary judgment was improper because factual issues exist and certain questions relating to negligence liability should be decided by a jury.

I. Vicarious liability

¶7 "A person is generally only liable for his or her own torts." ***Kerl v. Dennis Rasmussen, Inc.***, 2004 WI 86, ¶17, 273 Wis. 2d 106, 682 N.W.2d 328. Under certain circumstances, the law imposes vicarious liability "on a person who did not commit the tortious conduct but nevertheless is deemed responsible" by virtue of a supervisory relationship that person has over the tortfeasor. ***Id.*** Under the doctrine of respondeat superior, a doctrine arising from agency law, the master is subject to liability for the tortious acts of his or her servant. ***Id.***, ¶¶17-18. Vicarious liability arising from the respondeat superior doctrine typically arises in an employer-employee context. ***Id.***, ¶22. Generally, "a master will only be liable for torts of the servant committed within the scope of the servant's employment." ***Id.***, ¶23.

¶8 Normally, the scope-of-employment issue is submitted to the jury because it involves questions of intent and purpose. *See* ***id.***; ***Block v. Gomez***, 201 Wis. 2d 795, 804, 549 N.W.2d 783 (Ct. App. 1996). However, employees act within the scope of their employment only so long as they are, "at a minimum, 'partially actuated by a purpose to serve the employer.'" ***Block***, 201 Wis. 2d at 806 (citation omitted). Serving the employer need not be the sole, or even primary, purpose of the employee's conduct. ***Id.*** However, if the employee's conduct is too little actuated by service to the employer, or is motivated entirely by

the employee's own purpose, the conduct falls outside the scope of employment. ***Id.*** We can rule as a matter of law that conduct is outside the scope of employment if the evidence presented supports only that conclusion. ***Id.*** at 805.

¶9 Here, Behrendt offers no evidence that Fisher created the oil tank as part of service to Silvan. Although Silvan permitted employees to use scrap metal and company tools, the "mere fact that the servant commits a tort during the period of his employment is not enough to put the act within the scope of his employment." *See* ***Linden v. City Car Co.***, 239 Wis. 236, 239, 300 N.W. 925 (1941). While fabricated with Silvan's materials and permission, these side projects were solely for employees' personal benefit. There is no evidence suggesting that employees who engaged in side projects did so for Silvan's benefit. As a matter of law, then, Silvan cannot be held vicariously liable for injuries resulting from Fisher's project.[3]

II. Negligence

¶10 To maintain a claim for negligence, there must be (1) a duty of care on the defendant's part; (2) a breach of that duty; (3) a causal connection between the conduct and injury; and (4) actual loss or damage as a result of the injury. ***Rockweit v. Senecal***, 197 Wis. 2d 409, 418, 541 N.W.2d 742 (1995). Here, Behrendt makes much of causation and the ultimate question of negligence, as well as the circuit court's public policy rationale. However, we conclude that Behrendt has failed to show Silvan had a duty, making this case one of the rare

[3] Behrendt argues that there is a scope-of-employment issue because Sommers thought he was obligated to assist Fisher, his superior at Silvan. Behrendt, however, has not alleged that Sommers was negligent.

negligence cases where summary judgment is appropriate. *See* ***Beyak v. North Cent. Food Sys., Inc.***, 215 Wis. 2d 64, 69, 571 N.W.2d 912 (Ct. App. 1997).

¶11 Every individual is held minimally to an ordinary standard of care in all activities. ***Rockweit***, 197 Wis. 2d at 419. This duty is "the obligation of due care to refrain from any act which will cause *foreseeable* harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act." ***A.E. Inv. Corp. v. Link Builders, Inc.***, 62 Wis. 2d 479, 483-84, 214 N.W.2d 764 (1974) (emphasis added). Duty is established "when it can be said that it was *foreseeable* that [the defendant's] act or omission to act may cause harm to someone." ***Rolph v. EBI Cos.***, 159 Wis. 2d 518, 532, 464 N.W.2d 667 (1991) (emphasis added; citation omitted). "A person cannot be held responsible on the theory of negligence for an injury from an act or omission on his part unless it appears that such person had knowledge or reasonably was chargeable with knowledge that the act or omission involved danger to another." 57A AM. JUR. 2D, *Negligence* § 121 (2004).

¶12 Here, Behrendt argues that it was foreseeable that Silvan's policy of permitting side jobs, with no standards for manufacturing and no tracking of projects, might lead to some injury if any of the manufactured items were defective, and he emphasizes the factual dispute over whether Fisher knew the tank he was building was going to be pressurized. But what Fisher knew about Linczeski's plan for the tank—pressurized or not—is irrelevant to the question of

Silvan's duty: it is undisputed that Silvan had a policy prohibiting the manufacture of pressure vessels as side jobs.[4]

¶13 When the facts that allegedly give rise to a duty are agreed upon, existence of a duty is a question of law. ***Rockweit***, 197 Wis. 2d at 419. The only facts relevant to Silvan's duty are the existence of its policies permitting side jobs but prohibiting manufacture of pressure vessels. We conclude it is simply unforeseeable, as a matter of law, that (1) an employee would take on a side job, (2) recruit another employee to assist with that job, (3) proceed to fabricate a tank, and (4) give it to a third party who (5) subsequently asked for modifications that were (6) performed by another party, (7) resulting in an explosion ten years after the vessel was made.[5] And, although we need not address the public policy argument because we have concluded there was no duty on Silvan's part, we note that it is precisely this lack of foreseeability and absurdly attenuated chain of events that supports the circuit court's ruling in that regard.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[4] Behrendt emphasizes that some employees were manufacturing air tanks, which are pressurized. It is not clear that this was the case. Sommers' deposition testimony suggests that employees could purchase these at cost or were starting with scrapped, but otherwise tested, empty canisters. However, even if the origin of these tanks is a disputed fact, it is not a material one: it does not contradict the evidence that Silvan had a policy prohibiting manufacture of pressure tanks.

[5] Injury is even less foreseeable if Fisher made the tank intending it to be a pressure vessel. In that case, to foresee injury, Silvan would have had to additionally predict that Fisher would disregard company policy and successfully convince Sommers to violate policy as well.