DIVISION ONE
FILED: 7/16/2013
RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JULIE ANGULO,	)	1 CA-CV 12-0603
	)	
Plaintiff/Appellant,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
CITY OF PHOENIX,	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
Defendant/Appellee.	)	
	)	
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-015644

The Honorable Katherine M. Cooper, Judge

AFFIRMED

Schenk Podolsky — Mesa
by Adam V. Schenk
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Attorneys for Plaintiff/Appellant

Gary Verburg, Phoenix City Attorney — Phoenix
by Shannon M. Bell, Assistant City Attorney
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P O R T L E Y, Judge

¶1 Julie Angulo appeals the summary judgment entered in favor of the City of Phoenix ("City"). Because we find no error, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Angulo was injured after being struck in a crosswalk by a City vehicle driven by Jeffrey Stirek. She filed a notice of claim against Stirek and the City, but only served the City. Subsequently, Angulo filed a complaint against Stirek for his negligence and alleged that the City was vicariously liable.

¶3 Stirek filed a motion to dismiss and a motion for summary judgment. Because she had not served him with the notice of claim or the summons and complaint, Angulo agreed to dismiss the complaint against him with prejudice. Ariz. Rev. Stat. ("A.R.S.") section 12-821.01 (West 2013). After Stirek was dismissed, the City filed a successful motion for summary judgment asserting that Stirek's dismissal extinguished its potential vicarious liability pursuant to *DeGraff v. Smith*, 62 Ariz. 261, 157 P.2d 342 (1945).

DISCUSSION

¶4 Angulo argues that the superior court improperly granted summary judgment to the City. She contends that the procedural error which resulted in Stirek being dismissed with prejudice should not constitute an adjudication on the merits

and bar the City's vicarious liability. Angulo specifically argues we should create an equity and public policy exception to *DeGraff* and its progeny.

¶5 We review the grant of summary judgment de novo, "viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion," *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003), to determine "whether any genuine issues of material fact exist." *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, 55, ¶ 8, 156 P.3d 1157, 1160 (App. 2007). There are, however, no genuine issues of material fact, and no legal basis to create an exception to *DeGraff.*

¶6 In *DeGraff*, our supreme court held that after an alleged negligent employee was dismissed from the lawsuit with prejudice the employer could not be vicariously liable for the employee's negligence. 62 Ariz. at 269-70, 157 P.2d at 344-45. The majority reasoned that the employer cannot be held liable for its employee's negligence because "[a] dismissal with prejudice is an adjudication on the merits of the case." *Id.* at 269, 157 P.2d at 344, 345 (internal quotation marks and citations omitted); *see also Ford v. Revlon, Inc.*, 153 Ariz. 38, 42, 734 P.2d 580, 584 (1987) ("[W]hen the master's liability is based solely on the negligence of his servant, a judgment in favor of the servant is a judgment in favor of the master," but

"[w]hen the negligence of the master is independent of the negligence of the servant, the result may be different.") (citation omitted); *Torres v. Kennecott Copper Corp.*, 15 Ariz. App. 272, 274, 488 P.2d 477, 479 (1971) (holding that an employee's dismissal with prejudice barred the plaintiff's vicarious liability claims against the employer where the employer's "liability [wa]s based solely on the negligent acts of his [employee]"). Additionally, the court held that a dismissal with prejudice constitutes an adjudication on the merits even when the dismissal is based on a mistaken belief that the plaintiffs "had the right to continue their action against [the employer] after dismissing" the employee. *DeGraff*, 62 Ariz. at 264, 157 P.2d at 343.

¶7 Most recently, in *Law v. Verde Valley Medical Center,* we "reject[ed] Plaintiff's argument that the principles from *DeGraff* are no longer applicable." 217 Ariz. 92, 96, ¶ 13, 170 P.3d 701, 705 (App. 2007). There, we held that "[w]hen a judgment on the merits – including a dismissal with prejudice – is entered in favor of the other person," "there is no fault to impute and the party potentially vicariously liable . . . is not responsible for the fault of the other person." *Id.* (internal quotation marks omitted).

¶8 We do not know why Stirek was dismissed with prejudice, but do not fault Angulo for attempting to find some exception to *DeGraff*. However, given that our supreme court has not revisited *DeGraff* in more than fifty years, that court is in the best position to revisit and modify its opinion in an appropriate case.[1] *See, e.g.*, *Francis v. Ariz. Dep't of Transp.*, 192 Ariz. 269, 271, ¶ 10, 963 P.2d 1092, 1094 (App. 1998) (explaining that "once a point of law has been established, it must be followed by all courts of lower rank in subsequent cases where the same legal issue is raised"). Consequently, because this case falls squarely within the holding in *DeGraff*, we affirm the judgment.

[1] We also decline Angulo's request in the reply brief to seek to transfer this matter to our supreme court pursuant to Arizona Rule of Civil Appellate Procedure ("ARCAP") 19(c). *See* ARCAP 13(c) (stating that the reply brief "shall be confined strictly to rebuttal of points urged in the appellee's brief"); *Dawson v. Withycombe*, 216 Ariz. 84, 111, ¶ 91, 163 P.3d 1034, 1061 (App. 2007) ("We will not consider arguments made for the first time in a reply brief.").

CONCLUSION

¶9 Based on the foregoing, we affirm the judgment.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
SAMUEL A. THUMMA, Judge

K E S S L E R, J., specially concurring:

¶10 I concur with the majority that under *DeGraff v. Smith*, 62 Ariz. 261, 157 P.2d 342 (1945), we are bound to affirm the judgment in this case. However, I write separately because Angulo has made a compelling case that our supreme court should clarify the law on whether an employer can avoid respondeat superior liability when the complaint against the allegedly negligent employee has been dismissed on procedural grounds. As such, this case raises the issue of whether an employer's respondeat superior liability is premised on a possible judgment against the employee or on the employee's negligence contributing to the cause of injury. As other courts have held in what I think is a more logical approach, the employer's liability is premised on whether the employee, acting in the course and scope of his duties, was negligent and such

negligence contributed to the injury. In such a case, dismissal with prejudice of the claims against the employee on a procedural ground should not require dismissal of the complaint alleging respondent superior liability against the employer.[2]

¶11 In *DeGraff*, our supreme court held that when a plaintiff voluntarily dismisses with prejudice his complaint against the allegedly negligent employee, the respondeat superior claim against the employer must be dismissed. 62 Ariz. at 269-70, 157 P.2d at 344-45. However, it is unclear on what theory the court acted. At one point, the court seemed to say that in such context the employer can only be held liable if the employee's conduct, taken in the course and scope of employment, could make the employee be liable. *Id*. at 268, 157 P.2d at 344. Thus, if the employee is determined not to be liable on the

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[2] I do not agree with Angulo's argument that the respondeat superior bar in this context is based on principles of collateral estoppel or res judicata. Arizona has applied the issue preclusion standard set forth in the Restatement (Second) of Judgments (1982) ("Restatement"). *See Clusiau v. Clusiau Enters.*, 225 Ariz. 247, 250, 236 P.3d 1194, 1197 (App. 2010). "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive *in a subsequent action* between the parties, whether on the same or a different claim." Restatement § 27 (emphasis added). The same rule requiring subsequent actions applies to claim preclusion. *See Hall v. Lalli*, 194 Ariz. 54, 57, ¶ 7, 977 P.2d 776, 779 (1999); *see also* Restatement §§ 17(2), 19. There is no "valid and final judgment" from a prior action and no "subsequent action" here. *See Clusiau*, 225 Ariz. at 249-50, 236 P.3d at 1196-97.

merits, the employer cannot logically be liable and must be dismissed:

> Where a master and servant are joined as parties defendant in an action for injuries inflicted by the servant, a verdict which exonerates the servant from liability for injuries caused solely by the alleged negligence of the servant requires also the exoneration of the master.

Id. at 266, 157 P.2d at 344 (citation omitted). On this basis, a procedural misstep by the plaintiff which precludes a judgment against the employee should not bar the respondeat superior claim against the employer. This seems to be underscored by the court's statement that this result "is in accord with the general principle that a judgment in favor of either principal or agent . . . *rendered upon a ground equally applicable to both*, should be accepted as conclusive against a subsequent right of action against the other." *Id*. at 269, 157 P.2d at 345 (emphasis added).

¶12 However, as the court also stated in *DeGraff*, the same result occurs when the plaintiff releases the employee from liability: "By analogy, it is held that the release of an employee from liability for injuries inflicted while acting for the employer operates as a release of the employer." *Id*. (emphasis omitted). On this basis, the court would appear to be holding that a voluntary dismissal of the claims against the employee, regardless of any determination of the merits of the

complaint, bars respondeat superior liability. As such, while the court did not deal with whether a procedural misstep requiring dismissal with prejudice of the claim against the employee bars a respondeat superior claim, such a claim should be barred because a dismissal upon settlement would not necessarily deal with a determination of the merits of the claim against the employee. *See Law v. Verde Valley Med. Ctr.*, 217 Ariz. 92, 94, 96, ¶¶ 5, 15, 170 P.3d 701, 703, 705 (App. 2007) (stating dismissal with prejudice of claims against employees, one of which was based on settlement, bars respondeat superior claims).

¶13 The latter conclusion is undercut, however, by other language in *DeGraff*, logic and case law. First, as the court in *DeGraff* noted, even a voluntary dismissal of the employee would not preclude respondeat superior liability against the employer if there were allegations that another employee had negligently contributed to the harm, even if that employee was not sued. 62 Ariz. at 266, 157 P.2d at 344. It makes little sense to say those claims cannot proceed when the employee is named as a defendant and the claims are dismissed for a procedural misstep, but could have proceeded if the plaintiff simply did not sue the employee. *See Wiggs v. City of Phoenix*, 198 Ariz. 367, 371, ¶¶ 15-16, 10 P.3d 625, 629 (2000) (stating in respondeat superior

case, plaintiff need not name the alleged negligent agent or employee as a party).

¶14 Second, taken to its logical conclusion, the theory that a respondeat superior claim against an employer is barred based on a procedural misstep results in an untoward windfall for an employer. Under that theory, if the plaintiff sues the employer on respondeat superior grounds, but not the employee, and during the course of the litigation the statute of limitations runs against the employee, the employer should be entitled to summary judgment because no claim can now be successfully brought against the employee. This would not be the result if the bar applied only when there was a true determination that the employee was not negligent or the negligence did not contribute to the plaintiff's injury. *See Hovatter v. Shell Oil Co.*, 111 Ariz. 325, 326, 529 P.2d 224, 225 (1974) (holding that dismissal without prejudice against agent after the statute of limitations had run is not a determination on the merits, *i.e.*, liability cannot be presumed simply because a statute uninvolved with liability prevents a cause of action).

¶15 Finally, at least two states have expressly adopted the view that a dismissal with prejudice of the claims against the employee does not bar respondeat superior liability by the employer when the dismissal is on purely procedural grounds. *See Hughes v. Doe*, 639 S.E.2d 302, 304 (Va. 2007) (finding

dismissal of claim against employee based on statute of limitations does not bar respondeat superior claim against employer); *Gallegos v. City of Monte Vista*, 976 P.2d 299, 301-02 (Colo. Ct. App. 1998) (holding that when statute of limitations would have barred negligence claim against city employee, but not against city, procedural bar of claim against employee did not bar respondeat superior claim against the city).

¶16 When a negligence claim against an employee is dismissed with prejudice after a finding that the employee was not liable for the injury or damages, the employer cannot be logically held liable on a respondeat superior theory. Whether that result should still occur solely upon the involuntary dismissal of the claims against the employee for a procedural error needs to be clarified by our supreme court. Accordingly, I concur with the majority but only because the result in *DeGraff* seems to require us to affirm.

/s/
DONN KESSLER, Judge