COURT OF APPEALS DECISION DATED AND FILED

May 22, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2017AP80

Cir. Ct. No. 2014CV1137

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

JODI ZEICHERT, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR TO THE ESTATE OF RYAN ZEICHERT, CHARLES ZEICHERT, INDIVIDUALLY, CHARLES AND JODI ZEICHERT, AS THE PARENTS AND LEGAL GUARDIANS OF MATTHEW ZEICHERT (A MINOR) AND LORRAINE AND GERALD ZEICHERT,

PLAINTIFFS-APPELLANTS,

V.

ADAM J. RIEHL, STATE FARM AUTOMOBILE INSURANCE COMPANY, NETWORK HEALTH INSURANCE CORP. AND TODD D. GRUETZMACHER,

DEFENDANTS,

PROGRESSIVE CASUALTY INSURANCE COMPANY, ELLINGTON MUTUAL INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. This case arises out of a motor vehicle accident in which Lorraine Zeichert and Matthew Zeichert sustained injuries, and Ryan Zeichert was killed. The Zeicherts appeal a judgment and order granting summary judgment to Todd Gruetzmacher and his insurers, Ellington Mutual Insurance Company (Ellington Mutual), Liberty Mutual Insurance Company and Liberty Mutual Fire Insurance Company (together, Liberty Mutual), and granting Progressive Casualty Insurance Company's (Progressive)[1] motion to terminate its defense of Gruetzmacher. The Zeicherts argue the circuit court erred by concluding that Gruetzmacher was not vicariously liable for Adam Riehl's negligence because a master-servant relationship did not exist between Gruetzmacher and Riehl at the time of the accident. They also contend the court erred in granting Progressive's motion to terminate its defense. We reject the Zeicherts' argument and affirm.

BACKGROUND

¶2 Riehl is an independent contractor engaged in his own construction business. Gruetzmacher had asked Riehl to help him with a concrete project, and

[1] Progressive was Riehl's automobile insurer and settled with the Zeicherts in July 2016.

they verbally agreed on an hourly rate. On the day of the accident, Riehl had been working with Gruetzmacher on the site of the concrete project. At some point during the day, Gruetzmacher mentioned to Riehl that Al Kramer had asked Gruetzmacher to pick up concrete forms from Kramer's home and return them to Craig Romenesko, the owner of the forms. While the record is somewhat unclear in this regard, either Gruetzmacher asked Riehl, or Riehl volunteered, to pick up and deliver the concrete forms. Gruetzmacher testified in his deposition that Riehl told him Riehl had to go to Kramer's home anyway. Riehl testified in his deposition that he agreed to pick up the concrete forms as a favor to Gruetzmacher. It is undisputed that picking up the concrete forms was unrelated to the project on which Riehl and Gruetzmacher had been working. Riehl did not bill Gruetzmacher for his time picking up the forms.

¶3 At the time of the motor vehicle accident, Riehl was on his way to pick up the concrete forms from Kramer's house and return them to Romenesko. After failing to stop at a stop sign, Riehl's vehicle collided with a vehicle driven by Lorraine Zeichert, in which her grandsons, Matthew and Ryan, were passengers. As a result of the collision, Lorraine and Matthew sustained injuries, and Ryan was killed.

¶4 Initially, the Zeicherts brought claims only against Riehl and his automobile insurance provider, Progressive. In their fifth amended complaint, which is the operative pleading in this case, the Zeicherts alleged that Riehl was acting in the course of employment with Gruetzmacher at the time of the accident or, in the alternative, he was performing an errand at Gruetzmacher's direction, and Gruetzmacher was therefore vicariously liable for Riehl's negligence. The Zeicherts also joined in this action Ellington Mutual, which had issued a contractor's special policy to Gruetzmacher's business, T. Gruetzmacher

Construction, LLC, and Liberty Mutual Insurance Company, which had issued Gruetzmacher a personal liability insurance policy. Liberty Mutual Fire Insurance Company, Gruetzmacher's home and automobile insurer, later intervened in this action by stipulation of the parties.

¶5 Ellington Mutual and Liberty Mutual filed motions for declaratory judgment and summary judgment, respectively, as to whether their policies required them to indemnify Gruetzmacher in relation to the accident. Gruetzmacher meanwhile filed a motion for declaratory judgment seeking a determination that Progressive breached its duty to defend him. Progressive had initially denied Gruetzmacher's tender of defense under its policy, but, three months later, provided merits counsel for Gruetzmacher and paid all the costs and attorney fees Gruetzmacher incurred between the date of the tender and the date Progressive began defending Gruetzmacher.[2]

¶6 The parties agreed that a determination on whether Gruetzmacher was vicariously liable for Riehl's negligence would be dispositive as to all then-pending insurance coverage motions. The circuit court then determined there was no master-servant relationship between Gruetzmacher and Riehl at the time of the accident. Therefore, the court determined Gruetzmacher was not vicariously liable for Riehl's negligence and, accordingly, there was no indemnity coverage under any of the insurance policies. Consequently, the court dismissed the claims against Gruetzmacher and Liberty Mutual. The court further concluded that

[2] Progressive's brief states that during this time, the circuit court granted Ellington Mutual's motion to bifurcate and stay, staying the liability action and bifurcating coverage issues from liability, in an oral ruling on April 4, 2016. For record support, Progressive cites to the motion to bifurcate and stay. A transcript of the April 4, 2016 hearing is not in the record on appeal.

because Gruetzmacher would be dismissed, the issue of whether Progressive breached its duty to defend Gruetzmacher was moot. The Zeicherts now appeal.

DISCUSSION

¶7 The parties agree that the question of insurance coverages here turns on a determination of whether Gruetzmacher is vicariously liable for Riehl's alleged negligence. Gruetzmacher's vicarious liability, in turn, depends on whether a master-servant relationship existed between Gruetzmacher and Riehl at the time of the accident.[3]

¶8 We independently review a grant or denial of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate 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) (2015-16).[4] Here, there is no disputed issue of material fact as to the legal issue of Gruetzmacher's alleged vicarious liability. The dispositive question is, instead, whether the undisputed facts demonstrate that Gruetzmacher is vicariously liable for Riehl's actions. *See* ***Nottelson v. DILHR***, 94 Wis. 2d 106, 115-16, 287 N.W.2d 763, 768 (1980) (whether the facts fulfill a particular legal standard is a question of law).

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[3] Because we affirm the circuit court's determination that Riehl was not acting as Gruetzmacher's servant at the time of the accident, we need not address the language of the policies that would provide coverage for Gruetzmacher if he were found vicariously liable.

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

¶9 The grant or denial of a declaratory judgment is addressed to the circuit court's discretion. ***Olson v. Farrar***, 2012 WI 3, ¶24, 338 Wis. 2d 215, 227, 809 N.W.2d 1. However, when, as here, the exercise of such discretion turns upon a question of law, we review the question independently of the circuit court's determination. ***Id.***

I. Vicarious liability

¶10 Under the doctrine of respondeat superior, a "master" can be held liable for physical harm caused to third persons by the torts of his servant. ***Arsand v. City of Franklin***, 83 Wis. 2d 40, 45, 264 N.W.2d 579 (1978). An independent contractor is not a servant under the doctrine of respondeat superior. ***Id.*** at 52-53. In order to establish the existence of a master-servant relationship and Gruetzmacher's resulting vicarious liability, the Zeicherts must establish that Gruetzmacher had the right to control Riehl's physical conduct at the time of the accident. *See* ***id.*** at 46.

¶11 The Zeicherts argue that Riehl was acting as Gruetzmacher's servant[5] at the time of the accident. They contend that Gruetzmacher either "expressly ordered" or "directed" Riehl to pick up the concrete forms "by

[5] The Zeicherts also contend Riehl was Gruetzmacher's agent at the time of the accident. "The master/servant relationship is a species of agency; all servants are agents but not every agent is a servant." ***Kerl v. Dennis Rasmussen, Inc.***, 2004 WI 86, ¶20, 273 Wis. 2d 106, 682 N.W.2d 328 (citations omitted). "Unless an agent is also a servant, his principal will not be vicariously liable for his tortious conduct except under certain limited circumstances." ***Id.*** The Zeicherts concede that Gruetzmacher's vicarious liability is dependent on a finding that Riehl was acting as Gruetzmacher's servant, not just as his agent. Because the issue of a master-servant relationship is dispositive here, we need not decide whether an agency relationship existed at the time of the accident, as it has no bearing on the issue of Gruetzmacher's vicarious liability. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive).

providing him the location and allowing Riehl to volunteer." The Zeicherts argue that Gruetzmacher's "simple direction (or suggestion)" that Riehl pick up the forms would have been sufficient to establish a master-servant relationship. We reject the Zeicherts' argument that Gruetzmacher's mere suggestion, or even "direction"—in the sense that Gruetzmacher provided Riehl the location of the concrete forms and told him where to drop them off—establishes that Gruetzmacher had the right to control Riehl's performance of the task. Our decision in ***Reuter v. Murphy***, 2000 WI App 276, 240 Wis. 2d 110, 622 N.W.2d 464, directs our decision in this case as to the issue of Gruetzmacher's control over Riehl.[6] In ***Reuter***, a school district had an oral agreement with an individual that she transport children to and from school with her own car. ***Id.***, ¶1. We held the school district was not vicariously liable for the actions of that individual because she was an independent contractor, and the school district did not have the right to control the manner in which she transported the children. ***Id.***, ¶¶1-6.

¶12 ***Reuter*** teaches that it is the legal relationship between Gruetzmacher and Riehl at the time of the accident that matters, as it defines Gruetzmacher's right and ability to control Riehl's conduct. Mere directions, even specific ones, do not alone create or evidence a master-servant relationship. Here, as in ***Reuter***, Riehl was an independent contractor, he was driving his own vehicle, and he chose his own route regarding the concrete forms errand without any restrictions from Gruetzmacher. *See* ***id.***, ¶18. When Riehl left the concrete project site, his service to Gruetzmacher ended for the day. There is no evidence in the record that

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[6] To the extent the Zeicherts recommend we adopt the law of another state, we decline to do so in light of the controlling precedent in ***Arsand v. City of Franklin***, 83 Wis. 2d 40, 264 N.W.2d 579 (1978), and ***Reuter v. Murphy***, 2000 WI App 276, 240 Wis. 2d 110, 622 N.W.2d 464.

Gruetzmacher had any control over how, when, or in what manner Riehl was to pick up and deliver the concrete forms, nor the route he took in doing so. Moreover, at the time of the accident, Riehl was not performing any task for which Gruetzmacher had hired him or was to pay him. Indeed, unlike a typical servant, there was nothing obligating Riehl to complete the transport, nor does the record indicate any explicit consequences would attach should he fail to do so.

¶13 The Zeicherts argue that the fact Gruetzmacher did not pay Riehl to perform the task is immaterial, relying on ***Giese v. Montgomery Ward, Inc.***, 111 Wis. 2d 392, 331 N.W.2d 585 (1983). In ***Giese***, a father was held vicariously liable for the actions of his son because he had directed his son to mow the lawn. ***Id.*** at 417. The court reasoned that despite the fact the son was performing a "domestic chore," the father had directed the son to perform the task and had the right to control the son's performance of the task. ***Id.*** at 416-17. The Zeicherts rightly contend that the holding in ***Giese*** "hinges on the fact that the father *had the right* to control the task," regardless of any payment or lack of payment involved in the relationship. However, the fact Gruetzmacher did not pay Riehl to pick up the concrete forms is relevant to the inquiry as to whether a master-servant relationship existed. If Riehl was employed by, working for and therefore, paid by Gruetzmacher at the time of the accident, Gruetzmacher would likely have the right to control Riehl's actions. Here, again, there is no evidence that Gruetzmacher had the right to control Riehl in any way while he was driving to pick up the concrete forms. As explained above, Riehl was driving his own vehicle, he had completed his work for the day, and he agreed to, or offered to, do a favor for Gruetzmacher. Riehl's mere agreement or acquiescence to Gruetzmacher's request did not give Gruetzmacher the right to control Riehl's actions regarding the concrete forms.

¶14 We agree with the circuit court that Riehl was not acting as Gruetzmacher's servant when he went to retrieve the concrete forms. Accordingly Gruetzmacher was not vicariously liable for Riehl's alleged negligence regarding the accident. We therefore conclude the circuit court did not err in granting Ellington Mutual's motion for declaratory judgment and Liberty Mutual's motion for summary judgment.

II. Duty to defend

¶15 It appears the Zeicherts have conceded that the issue of Progressive's alleged breach of its duty to defend Gruetzmacher is moot if we affirm the circuit court on the master-servant issue. To the extent they have not made such a concession, we address the issue and conclude that, under these facts, the circuit court properly found this coverage issue moot.

¶16 "When a complaint alleges facts that, if proven, would constitute a covered claim, the insurer must appoint defense counsel for its insured without looking beyond the complaint's four corners." ***Olson***, 338 Wis. 2d 215, ¶31. Here, the Zeicherts' fifth amended complaint alleged Gruetzmacher was vicariously liable for Riehl's negligence.

¶17 After Progressive denied the tender of defense, but before it provided a defense, Gruetzmacher moved for declaratory judgment, asserting that Progressive's policy provided coverage for his alleged vicarious liability. Gruetzmacher's motion had not been determined at the time the circuit court issued a written decision as to Ellington Mutual's and Liberty Mutual's coverage motions, which resulted in dismissal of Gruetzmacher as a defendant. At that time, the circuit court concluded the issue of Progressive's coverage and duty to

defend was moot because Gruetzmacher had been dismissed as a defendant. We agree.

¶18 An issue is moot when its resolution will have no practical effect on the underlying controversy. ***State ex rel. Milwaukee Cty. Pers. Rev. Bd. v. Clarke***, 2006 WI App 186, ¶28, 296 Wis. 2d 210, 723 N.W.2d 141. We independently determine whether an issue is moot. ***Id.***

¶19 The record reflects that Progressive has paid any and all sums owed arising from its potential breach of its duty to defend Gruetzmacher prior to the circuit court's dismissal of Gruetzmacher from the case. Moreover, given Gruetzmacher's dismissal from the liability action, there is no possibility he will be liable to the Zeicherts in an amount in excess of Progressive's policy limits. Under these circumstances, we agree with the circuit court that Gruetzmacher's motion for declaratory judgment on coverage and duty to defend was moot, as it will have no practical effect on the existing controversy.

By the Court.—Judgment and order affirmed.

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