COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 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. 2017AP795 **Cir. Ct. No. 2015CV006958**

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

ESTATE OF TOMAS SARAVI BY ITS SPECIAL ADMINISTRATOR, MIGUEL SARAVI AND FLORENCIA GAMES DE SARAVI,

PLAINTIFFS,

DYLAN CHART,

PLAINTIFF-APPELLANT,

V.

DISTRICT 6220 RYE PROGRAM, INC. AND LAKELAND MINOCQUA ROTARY CLUB,

DEFENDANTS-RESPONDENTS,

CENTRAL STATES ROTARY INTERNATIONAL YOUTH EXCHANGE PROGRAM, CINCINNATI INSURANCE COMPANY, ABC INSURANCE COMPANY, ESTATE OF DIANE M. CHART, ACE AMERICAN INSURANCE COMPANY, ACE PROPERTY AND CASUALTY INSURANCE COMPANY, CHUBB NATIONAL INSURANCE COMPANY, HARTFORD UNDERWRITERS INSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, ROTARY INTERNATIONAL AND PPH NATIONAL INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: MARSHALL B. MURRAY, Judge. *Affirmed.*

Before Brennan, P.J., Stark and Dugan, JJ.

¶1 PER CURIAM. Dylan Chart appeals a circuit court order granting summary judgment in favor of two defendants in this personal injury action: the District 6220 Rye Program, Inc., and Lakeland Minoqua Rotary Club (collectively, "Rotary Defendants").[1] Chart argues that the Rotary Defendants are vicariously or directly liable for his injuries, and, therefore, it was improper to grant summary judgment against him. We disagree and affirm.

BACKGROUND

¶2 Chart, a minor child, was a passenger in a car driven by his mother, Diane M. Chart (hereafter, "Diane"). Also present in the car was a teenage foreign exchange student, Tomas Saravi, who lived with the Chart family in northern Wisconsin as a participant in a Rotary program that placed foreign students with host families. Diane had driven to the airport in Milwaukee to pick up Saravi, who was returning to Wisconsin from a trip to California. Shortly after Diane picked up Saravi from the Milwaukee airport to transport him back to northern

[1] Chart originally appealed the dismissal of claims against two other parties but subsequently moved to voluntarily dismiss those respondents—Rotary International and PPH National Insurance Company—from this appeal. We do not discuss those parties or the rulings related to them.

Wisconsin, her car collided with another vehicle. Tragically, both Diane and Saravi were killed, and Chart was injured.

¶3 Chart, as well as Saravi's parents and his estate, filed suit against numerous defendants. The claims of Saravi's parents and estate have been settled, and Chart's claim against Diane's estate is stayed pending the outcome of this appeal. The only claims at issue in this appeal are Chart's claims against the Rotary Defendants.

¶4 Chart's amended complaint alleged that the collision with the other vehicle "occurred as a proximate result of the negligence and carelessness of Diane M. Chart." The amended complaint further alleged that Diane "was acting as a volunteer" for the Rotary Defendants and other Rotary-related entities, and, therefore, those entities are liable for Diane's "negligence and carelessness."

¶5 The Rotary Defendants moved for summary judgment, asserting that they are not vicariously liable for Diane's alleged negligence because they did not exercise the requisite degree of control over Diane. They also argued that "public policy simply does not support the imposition of vicarious liability" against the Rotary Defendants for the injuries Diane's son suffered as a result of her alleged negligence.

¶6 In his response, Chart asserted that the Rotary Defendants were both *directly* liable and *vicariously* liable for Diane's alleged negligence. After hearing oral argument, the circuit court concluded that summary judgment in the Rotary Defendants' favor was appropriate because they were not vicariously or directly liable for Diane's alleged negligence. The circuit court subsequently denied Chart's motion for reconsideration. This appeal follows.

STANDARD OF REVIEW

¶7 This court reviews summary judgment decisions *de novo*, applying the same legal standards 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); *see also* WIS. STAT. § 802.08 (2015-16).[2] In deciding if there are genuine issues of material fact, we draw all reasonable inferences in favor of the non-moving party. ***Metropolitan Ventures, LLC v. GEA Assocs.***, 2006 WI 71, ¶20, 291 Wis. 2d 393, 717 N.W.2d 58.

DISCUSSION

¶8 On appeal, Chart continues to assert that the Rotary Defendants are both vicariously and directly liable for his mother's negligence, although he only briefly addresses direct liability. We consider each issue in turn.

I. Vicarious liability

¶9 "A person is generally only liable for his or her own torts. Under certain circumstances, however, the law will impose vicarious liability on a person who did not commit the tortious conduct but nevertheless is deemed responsible by virtue of the close relationship between that person and the tortfeasor." ***Kerl v. Dennis Rasmussen, Inc.***, 2004 WI 86, ¶17, 273 Wis. 2d 106, 682 N.W.2d 328

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

(citation omitted). For instance, vicarious liability may arise under the doctrine of respondeat superior, also known as "the master/servant rule." *See* ***id.*** "Vicarious liability under respondeat superior is 'liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) because of the relationship between the two parties.'" ***Id.*** (citation omitted).

¶10 ***Kerl*** held that "[a] prerequisite to vicarious liability under respondeat superior is the existence of a master/servant relationship." *See* ***id.***, ¶18. ***Kerl*** also recognized that although "[v]icarious liability under respondeat superior typically arises in employer/employee relationships … [it] is not confined to this type of agency." *See* ***id.***, ¶22. ***Kerl*** discussed the policy behind the imposition of vicarious liability in a master/servant relationship and provided guidance concerning the circumstances under which such a relationship exists, beginning with a quotation from RESTATEMENT (SECOND) OF AGENCY § 219, cmt. a (AM. LAW INST. 1958):

> "The conception of the master's liability to third persons appears to be an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant. From this, the idea of responsibility for the harm done by the servant's activities followed naturally. The assumption of control is a usual basis for imposing tort liability when the thing controlled causes harm. It is true that normally one in control of tangible things is not liable without fault. But in the law of master and servant the use of the fiction that 'the act of the servant is the act of the master' has made it seem fair to subject the non-faulty employer to liability for the negligent and other faulty conduct of his servants."
>
> The modern consensus is that vicarious liability is also justified on common law policy grounds as a device for spreading risk and encouraging safety and the exercise of due care by employees/servants. Exposure to vicarious liability creates an incentive for masters who control or have the right to control the conduct of their servants to

> take steps to ensure that their servants exercise due care in carrying out the master's business….
>
> Although the rationale for vicarious liability has expanded and the circumstances of its application have become more diverse, the basic formula for respondeat superior has remained the same: *only a "master" who has the requisite degree of control or right of control over the physical conduct of a "servant" in the performance of the master's business will be held vicariously liable.* To impose vicarious liability where the requisite degree of control is lacking would not serve the original or more recent justifications for the rule. *If a principal does not control or have the right to control the day-to-day physical conduct of the agent, then the opportunity and incentive to promote safety and the exercise of due care are not present, and imposing liability without fault becomes difficult to justify on fairness grounds.*

See ***id.***, ¶¶25-27 (emphasis added; citations omitted).

¶11 Consistent with those principles, the issue before this court is not whether a volunteer like Diane *can be* a servant for organizations like the Rotary Defendants, but whether she *was* in this case. We agree with the circuit court that she was not, and, therefore, the Rotary Defendants are not vicariously liable for Diane's negligence.

¶12 We begin with Chart's arguments in favor of vicarious liability.[3] Chart provides factual background on Diane's membership in the Lakeland Club, her role as a host parent for Saravi, and the Rotary rules governing the student exchange program.[4] Chart emphasizes that before Saravi was able to travel

[3] Chart's brief addresses numerous cases discussed in the circuit court, such as those concerning the scope of employment and a foster parenting case. We conclude that the principles outlined in ***Kerl v. Dennis Rasmussen, Inc.***, 2004 WI 86, 273 Wis. 2d 106, 682 N.W.2d 328, are determinative in this case, and, therefore, we do not discuss the other cases.

[4] Consistent with summary judgment standards, we are drawing all reasonable factual inferences in favor of Chart, the non-moving party. *See* ***Metropolitan Ventures, LLC v. GEA Assocs.***, 2006 WI 71, ¶20, 291 Wis. 2d 393, 717 N.W.2d 58.

outside of his "host district,"[5] he had to receive specific permission from the Rotary Defendants and follow "very strict rules" enacted by the Rotary Defendants. He further asserts that pursuant to those rules, "transportation of an exchange student outside of the borders of the host district was permitted to be done only by a person approved" by the Rotary Defendants. Chart argues that Diane "was selected and approved as a volunteer to pick up Tomas Saravi from the Milwaukee airport, [and] to transport him back to the host District," and that in doing so, Diane "was acting on behalf of, and in the name of Rotary while picking up Saravi."[6]

¶13 In addition to arguing that Diane was acting on behalf of the Rotary Defendants, Chart also asserts that the Rotary Defendants "directed the task to be completed" and that Diane "did not have the authority to change that task." (Underlining omitted.) Chart further emphasizes that Diane's provision of transportation for Saravi outside the host district provided a benefit to the Rotary Defendants. Chart concludes that those facts demonstrate Diane was acting as a servant for the Rotary Defendants and that those defendants are, therefore, vicariously liable for injuries to Chart caused by Diane's alleged negligence.

[5] Rotary materials in the record suggest there are several Rotary districts in Wisconsin and that the District 6220 Rye Program, Inc., covers north central and northwestern Wisconsin and does not include Milwaukee. The district where Saravi lived with his host family is his "host district."

[6] The parties debate whether Diane was acting as a host parent or, as Chart asserts, "wearing a different 'hat' at the time" she was transporting Saravi from the airport back to her home. For purposes of this appeal, we accept Chart's assertion that at the time of the accident, Diane was transporting Saravi not because she was his host parent, but instead because she was selected to be the driver who was approved to transport Saravi outside the district.

¶14 The fact that Diane may have been providing a benefit for Saravi and the Rotary Defendants by offering to transport Saravi outside the district is not determinative. Under ***Kerl***, we must consider whether the principal—the Rotary Defendants—had "the right to control the day-to-day physical conduct of the agent," Diane. *See* ***id.***, 273 Wis. 2d 106, ¶27 (italics omitted). We agree with the Rotary Defendants that they did not have the right to control Diane's physical conduct. As they explain:

> There is no evidence that the [Rotary Defendants] attempted to instruct Diane Chart on the route she had to take when picking Saravi up from the airport. They did not tell her when she had to leave or when she had to return.[7] They also did not attempt to control the manner of her driving. They further did not require that she drive any particular type of car and did not require her to perform any periodic maintenance on that car. These aspects of Diane Chart's driving were within her complete control at all times and there is absolutely nothing in the record to the contrary. Furthermore, the [Rotary Defendants] certainly did not control any of Diane Chart's conduct related to her son, Dylan. They did not, and could not, control whether he would be a passenger in the car with her that day.

We also note that there is no indication the Rotary Defendants were aware of Diane's specific travel plans—which included driving to Milwaukee a day early, spending the night with relatives, and taking Chart to the zoo before going to the airport—or that she would have Chart with her.

¶15 Having reviewed the parties' briefs and materials offered in support of and in opposition to summary judgment, we conclude that under the principles

[7] We agree with Chart that the deposition testimony and written rules governing student travel suggest that Diane was required to pick up Saravi at the Milwaukee airport when his flight arrived, but we do not agree that requirement constituted a sufficient exercise of control over Diane to make her a servant of the Rotary Defendants.

outlined in ***Kerl***, Diane was not acting as a servant for the Rotary Defendants at the time of the accident. Other than requiring Diane to pick up Saravi at the airport when he arrived, they did not exercise sufficient control over Diane or over her driving—such as specifying the route she must take, the car she must drive, and whether she could have other people in the car—for her to be considered a servant. In summary, we conclude that the Rotary Defendants' level of control over Diane's driving was insufficient to justify the imposition of vicarious liability. Accordingly, the Rotary Defendants were entitled to summary judgment.[8]

II. Direct liability

¶16 Chart's second argument on appeal is that the Rotary Defendants are "directly responsible for the actions" of Diane because only drivers selected by the Rotary Defendants are permitted to transport students outside the host district. Chart argues that because Diane was "engaged in the delivery of Rotary services," the Rotary Defendants "are directly responsible for Diane's negligence." Chart's argument is brief and does not provide citations to legal authority. We decline to develop Chart's argument for him and will not consider this claim further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (stating that the court "may decline to review issues inadequately briefed" and that "[a]rguments unsupported by references to legal authority will not be

[8] In addition to arguing that Diane was not a servant of the Rotary Defendants, the Rotary Defendants also present a public policy argument, asserting that they should not be held vicariously liable for Chart's injuries where his presence in Diane's car was neither contemplated by, nor a benefit to, the Rotary Defendants. Given our conclusion that the Rotary Defendants are not vicariously liable because Diane was not their servant, we decline to address that public policy argument. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

considered"). We also note that Chart's reply brief provides no response to the cases and legal analysis the Rotary Defendants offer in their response brief. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (unrefuted arguments are deemed conceded).

By the Court.—Order affirmed.

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