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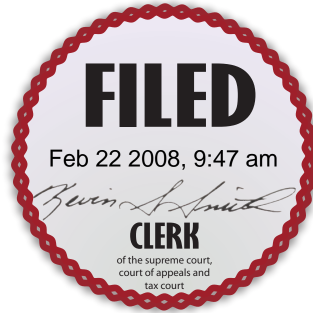

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IN THE
COURT OF APPEALS OF INDIANA

SHARON L. ROW,

Appellant-Plaintiff,

vs.

PAUL ROW, SAINT MARK'S EVANGELICAL LUTHERAN CHURCH and SAINT PETER'S EVANGELICAL LUTHERAN CHURCH,

Appellees-Defendants.

No. 17A03-0709-CV-425

APPEAL FROM THE DEKALB CIRCUIT COURT
The Honorable Robert C. Probst, Senior Judge
Cause No. 17C01-0405-CT-16

February 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Sharon Row appeals from the trial court's grant of summary judgment in favor of Saint Mark's Evangelical Lutheran Church and Saint Peter's Evangelical Lutheran Church (collectively "the Church"). Sharon presents a single dispositive issue for our review, namely, whether there exists a genuine issue of material fact precluding summary judgment.

We affirm.

FACTS AND PROCEDURAL HISTORY

Sharon and Paul Row were married for more than thirteen years. During that time, Paul was employed by the Church as a pastor, and the Rows lived in a parsonage owned and maintained by the Church. On June 5, 2002, while still married, Sharon and Paul were home together at the parsonage when an argument ensued between them. The argument escalated, and Sharon subsequently filed a complaint for damages against Paul and the Church alleging that Paul had assaulted and battered her on that date. Sharon alleged in relevant part that the Church was vicariously liable for her injuries. Sharon also alleged, in the alternative, that the Church was liable under premises liability theory.

The Church filed a summary judgment motion alleging that it was not liable to Sharon as a matter of law. Following a hearing, the trial court granted that motion, finding and concluding in relevant part:

> 7. The Plaintiff and Mr. Row were alone in the parsonage kitchen at the time of the incident. This parsonage was their private residence. There is no evidence that Mr. Row was engaged in any act or acts as a pastor, or that his position as the pastor was related to the alleged attack against the Plaintiff. There is no evidence that any member or official of either of the

Churches authorized Mr. Row to perpetrate any assault and battery against the Plaintiff.

8. The Plaintiff contends that Mr. Row was "always on duty," however, there is no evidence that those "duties" included committing an assault and battery against anyone. Mr. Row was not with the Plaintiff that day because of his "duties" as the pastor of the Churches.

9. There is no evidence that Mr. Row was engaged in any "authorized acts or serving the interests of his employer(s) at the time" of the incident. [Konkle v. Henson, 672 N.E.2d 450, 457 (Ind. Ct. App. 1996)].

10. The Court finds that Mr. Row was not acting within the course or scope of his employment as the pastor of the Churches at the time of the incident and the Churches have no liability under the theory of respondeat superior.

11. The Court further finds that the Churches did not authorize Mr. Row to perpetrate an assault and battery upon anyone as one of the "duties" of the pastor of the Churches and there is no evidence that Mr. Row was with the Plaintiff at the time of the incident because of his "duties" as a pastor of the Churches. The Court finds that there is no vicarious liability applicable to the Churches.

12. Plaintiff contends that the Churches are liable to the Plaintiff because the incident took place in the Churches' parsonage under the theory of "premises liability."

13. While there is evidence that members of the Churches had keys to the parsonage, the evidence established that these keys were used to gain access for maintenance purposes and at the time of the incident the Churches did not have control over the parsonage because it was then being used by the Plaintiff and Mr. Row as their marital residence.

14. There is no evidence that the condition of the residence caused the injuries allegedly sustained by the Plaintiff or contributed in any way to those alleged injuries.

* * *

19. The Court finds that there are no genuine issues as to any material fact, or facts, that could, or would, impose any liability upon the Churches as a matter of law on any theory alleged by the Plaintiff, and the Churches' Motion for Summary Judgment should be granted.

Appellant's App. at 3-5. This appeal ensued.

DISCUSSION AND DECISION

In reviewing summary judgment, we apply the same standard as the trial court. Wright v. American States Ins. Co., 765 N.E.2d 690, 692 (Ind. Ct. App. 2002). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). Any doubt as to a fact, or an inference to be drawn, is resolved in favor of the non-moving party. Sanchez v. Hamara, 534 N.E.2d 756, 757 (Ind. Ct. App. 1989). The appellant bears the burden of persuading us the grant of summary judgment was erroneous. Bank One Trust No. 386 v. Zem, Inc., 809 N.E.2d 873, 878 (Ind. Ct. App. 2004), trans. denied.

We note that the trial court made findings and conclusions in support of its entry of summary judgment. Although we are not bound by the trial court's findings and conclusions, they aid our review by providing reasons for the trial court's decision. See Ledbetter v. Ball Mem'l Hosp., 724 N.E.2d 1113, 1116 (Ind. Ct. App. 2000), trans. denied. If the trial court's entry of summary judgment can be sustained on any theory or basis in the record, we must affirm. Id.

Sharon first contends that the trial court erred when it found no genuine issue of material fact regarding whether the Church is vicariously liable for Paul's actions under respondeat superior. Respondeat superior imposes liability, where none would otherwise exist, on an employer for the wrongful acts of his employee which are committed within the scope of employment. Stropes by Taylor v. Heritage House Children's Ctr. of

Shelbyville, Inc., 547 N.E.2d 244, 247 (Ind. 1989). In Konkle v. Henson, 672 N.E.2d 450, 457 (Ind. Ct. App. 1996), this court explained:

> The determination of whether an employee was acting within the scope of his employment does not turn on the type of act committed. An employer can be vicariously liable for the criminal acts of an employee. The test is whether the employee's actions were at least for a time authorized. If there is a sufficient association between the authorized and unauthorized acts, then the unauthorized acts can be within the scope of employment. If some of the employee's actions were authorized, the question of whether the unauthorized acts were within the scope of employment is one for the jury. However, if none of the employee's acts were authorized, there is no respondeat superior liability and summary judgment is proper.

(Emphases added).

Here, Sharon maintains that there is designated evidence establishing a question of fact whether Paul was engaged in his duties as pastor at the time of the alleged attack. In particular, Sharon argues:

> Paul Row and the Saint Mark's council president testified that he was always on duty as a pastor. (App. 104; 129). His job duties including [sic] ministering to all the Church Defendant parishioners (App. 57), including Sharon Row, who was a member of Saint Peter's. Paul Row also testified that members of the Church councils were aware of his marital troubles before the June 5 incident. (App. 94, 115, 118). A jury should be permitted to review these facts to determine whether there is a sufficient nexus to hold the Churches liable as employers of Paul Row.

Brief of Appellant at 10.

But our review of the designated evidence does not reveal that Paul was engaged in any of his duties as pastor at or around the time of the alleged battery. He was dressed and ready for work, but he was not working. While he was always "on call" to attend to his duties as pastor, Appellant's App. at 104, there is no evidence that he was acting as pastor to Sharon at the time of the incident. Sharon has not designated evidence showing

that the Church authorized any of Paul's acts at or around the time of the incident. Nor has Sharon demonstrated a sufficient association between Paul's authorized and unauthorized acts. See Konkle, 672 N.E.2d at 457. The trial court did not err when it granted summary judgment in favor of the Church on the issue of respondeat superior.

Sharon also contends that the trial court erred when it found no genuine issue of material fact on the allegation that the Church is liable under premises liability theory. In particular, Sharon asserts that because the Church had control over the parsonage, the Church is liable for the injuries Paul allegedly inflicted on her. Sharon is correct that "[t]he thread through the law imposing liability upon occupancy of premises is control." Harris v. Traini, 759 N.E.2d 215, 225 (Ind. Ct. App. 2001) (quoting Great Atl. & Pac. Tea Co. v. Wilson, 408 N.E.2d 144, 150 (Ind. Ct. App. 1980)). "[O]nly the party who controls the land can remedy the hazardous conditions which exist upon it and only the party who controls the land has the right to prevent others from coming onto it. Thus, the party in control of the land has the exclusive ability to prevent injury from occurring." Id. (quoting City of Bloomington v. Kuruzovich, 517 N.E.2d 408, 411 (Ind. Ct. App. 1987), trans. denied).

But, regardless of whether the Church exercised control over the parsonage, there must be evidence of a "hazardous condition" present on the land that caused Sharon's injuries. See id. That element of premises liability theory is absent in this case. As the trial court correctly found, "[t]here is no evidence that the condition of the residence caused the injuries allegedly sustained by the Plaintiff or contributed in any way to those

alleged injuries." Appellant's App. at 4. Sharon's premises liability claim fails as a matter of law.[1]

In sum, the trial court did not err when it found that there exist no genuine issues of material fact regarding the Church's liability for Paul's alleged battery of Sharon. The trial court properly entered summary judgment in favor of the Church.

Affirmed.

BAILEY, J., and CRONE, J., concur.

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[1] We note that Sharon makes no contention that the Church had a duty to protect her from the battery under the rule set out in Paragon Family Restaurant v. Bartolini, 799 N.E.2d 1048, 1052 (Ind. 2003), namely, that landowners have a duty to take reasonable precautions to protect their invitees from foreseeable criminal attacks. While she makes vague references to what the Church knew or should have known regarding Paul's propensity for violence, she does not present cogent argument on this rule of law. As such, the issue is not properly before us for review.