MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Bobby L. Timbrook, as Special Administrator of the Estate of Maxwell Timbrook,

Appellant-Plaintiff,

v.

Kurt Russell and Costco Wholesale Corporation,

Appellees-Defendants

October 12, 2023

Court of Appeals Case No. 23A-CT-379

Appeal from the Marion Superior Court

The Honorable John M.T. Chavis, Judge

Trial Court Cause No. 49D05-2201-CT-000814

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] Bobby L. Timbrook, as the special administrator of the estate of his deceased son, Maxwell, appeals the trial court's entry of summary judgment[1] against him on his claim that Costco Wholesale Corporation negligently hired or retained an employee who had caused Maxwell's death. The trial court entered summary judgment for Costco on that claim after Timbrook conceded to the court that the employee's wrongful conduct did not occur on Costco's premises or while using Costco's personal property. The trial court's decision was correct as a matter of Indiana law, and we therefore affirm its judgment for Costco.

Facts and Procedural History

[2] Sometime prior to 2014, Costco hired Kurt Russell, an Indianapolis resident, as an employee at Costco's Michigan Road location in Indianapolis. In 2014, Russell overdosed on narcotics while working on Costco's premises. In 2015, Russell was convicted of Level 6 felony possession of a narcotic drug and placed on probation. During his probationary term, the State filed at least three notices of violation against Russell, and, in May 2017, Russell failed a drug screen for opiates. In 2017, Russell again overdosed while working on Costco's premises.

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[1] The trial court styled its order as a dismissal, as Costco had sought that relief pursuant to Indiana Trial Rule 12(B)(6). However, in support of its request for relief, Costco submitted, without objection, evidence outside the pleadings, which the trial court did not exclude. Thus, the court's judgment on Costco's motion was the entry of a summary judgment. *See, e.g.*, *West v. Wadlington*, 933 N.E.2d 1274, 1276 (Ind. 2010) (citing Ind. Trial Rule 12(B)). We review it accordingly.

[3] In 2019 and 2020, Maxwell, a Zionsville resident, was also a Costco employee at the Michigan Road location. "[D]ue to multiple work[-]related and military[-]service-related injuries," Maxwell "became addicted to narcotic pain medications." Appellant's App. Vol. 2, p. 17. Costco's management and Russell's fellow Costco employees knew Russell to possess, use, and sell illegal drugs on Costco's premises between 2014 and Costco's termination of Russell's employment in 2021. Specifically, in January 2019, they "knew that Russell was providing illegal drugs to Maxwell . . . because of [Maxwell's] narcotic pain medication addiction." *Id.*

[4] In January 2019, Maxwell overdosed from illegal drugs provided to him by Russell on Costco's premises. Costco "assisted Maxwell" is obtaining "admission to drug rehabilitation in Arizona" following that incident. *Id.* at 18. However, Costco did not terminate Russell's employment. Instead, a manager at Costco informed Timbrook that Costco would keep Russell's and Maxwell's schedules separated so that the two "would not be working together at the same time on Costco's premises." *Id.* at 19. Between the fall of 2019 and January 13, 2020, Russell and Maxwell were again working together on Costco's premises, and Russell was "harass[ing]" Maxwell about purchasing narcotics from Russell. *Id.*

[5] In the evening hours of January 17, 2020, Russell, using his personal cell phone, sent a text message to Maxwell on Maxwell's personal cell phone. Russell asked Maxwell if Maxwell wanted to purchase any "suppl[ies]" from Russell. *Id.* at 58. There is no dispute that Russell was referring to heroin, and

Maxwell agreed to purchase some. Around 9:35 p.m., Maxwell drove from his Zionsville home to Russell's home in Indianapolis. Maxwell waited in his car near Russell's home for over an hour before Russell obtained the heroin, which Russell then sold to Maxwell. Maxwell drove back to his Zionsville residence around midnight and used the heroin. At 12:36 a.m. on January 18, Maxwell texted Russell, "I think it's fentanyl." *Id.* at 61. Maxwell died from fentanyl intoxication, and his mother found his body that afternoon.

[6] The State charged Russell with Level 1 felony dealing in a controlled substance. Russell was convicted on that charge, and a trial court sentenced him to twenty-five years.

[7] Meanwhile, in the instant matter, Timbrook, as the special administrator for Maxwell's estate, sued Costco on the theory that Costco had negligently hired or retained Russell as an employee, which had proximately caused Maxwell's death. After Timbrook amended his complaint, Costco moved to dismiss Timbrook's claim, in relevant part, for failing to state a claim. Costco attached to its motion the Zionsville Police Department's probable-cause affidavit underlying the State's Level 1 felony charge against Russell.

[8] Timbrook did not object to Costco's evidentiary submission. Instead, in his response, Timbrook conceded that "Russell's illegal drug sales and activity which led to [Maxwell's] death did not arise out of [Russell's] employment with Costco." *Id.* at 68. Timbrook further conceded that "the illegal drug transaction leading to [Maxwell's] death did not occur on Costco's premises." *Id.* And

neither did Timbrook's amended complaint allege that Russell's January 17 sale of a controlled substance to Maxwell involve the use of any of Costco's personal property.

[9] The trial court held a hearing on Costco's motion. Following that hearing, and expressly relying on Timbrook's concessions, the trial court entered judgment for Costco on Timbrook's negligent-hiring-or-retention claim. This appeal ensued.

Standard of Review

[10] Timbrook appeals the trial court's entry of summary judgment for Costco. "We review summary judgment decisions de novo, applying the same standard as the trial court." *Miller v. Patel*, 212 N.E.3d 639, 644 (Ind. 2023) (citation omitted). Summary judgment is proper only "if the designated evidentiary matter shows 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." *Id.* (citing Ind. Trial Rule 56(C)). In reviewing these motions, we "draw all reasonable inferences in the non-moving party's favor." *Id.* (citation omitted).

The undisputed facts negate an element of Timbrook's claim against Costco.

[11] Timbrook's only claim is that Costco negligently hired or retained Russell as its employee. For such claims, Indiana's courts have adopted section 317 of the Restatement (Second) of Torts (Am. L. Inst. 1965). *Sedam v. 2JR Pizza Enters.,*

LLC, 84 N.E.3d 1174, 1179 (Ind. 2017) (citing *Parr v. McDade*, 161 Ind. App. 106, 117-18, 314 N.E.2d 768, 774-75 (1974)). As our Supreme Court has noted:

> Section 317 provides that "[a] master is under a duty to exercise reasonable care *so to control his servant* while acting outside the scope of his employment[.]" Restatement (Second) of Torts § 317 (Am. Law Inst. 1965). This rule is "applicable only when the servant is acting outside the scope of his employment. If the servant is acting within the scope of his employment, the master may be vicariously liable under the principles of the law of Agency." *Id.* § 317 cmt. a.

Id. (emphasis added).

[12] Section 317 provides as follows:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) *the servant*
>
> (i) *is upon the premises in possession of the master* or upon which the servant is privileged to enter only as his servant, *or*
>
> (ii) *is using a chattel of the master*, and
>
> (b) the master

> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

(Emphasis added.)

[13] The undisputed evidence demonstrates that subpart (a) of section 317 is not satisfied here. Timbrook conceded to the trial court that Russell's sale of the controlled substances that resulted in Maxwell's death did not occur on Costco's premises. And Timbrook has not alleged that Russell's sale of the controlled substances that resulted in Maxwell's death involved the use of Costco's "chattel," i.e., Costco's personal property. Therefore, the record shows that Costco negated an element of Timbrook's claim, and Costco was entitled to judgment as a matter of law accordingly.

[14] Still, in his brief on appeal, Timbrook repeatedly emphasizes, through both the record and his use of authority, the foreseeability to Costco that Russell would engage with Maxwell and sell controlled substances to Maxwell that could cause death. We have no qualms with Timbrook's assessment of foreseeability, but foreseeability alone is insufficient to demonstrate Costco's liability here. Rather, as section 317 makes clear, to hold an employer liable for an employee acting outside the scope of his employment, a plaintiff must demonstrate that the employer had some ability to control the employee at the time in question. That is the point of section 317's subpart (a). That requirement further operates

to limit liability against employers, and Timbrook's argument to disregard that requirement would expand the scope of employer liability beyond section 317's recognized limits, which we will not do.

[15] For all of these reasons, the trial court properly entered summary judgment for Costco, and we affirm the trial court's judgment.[2]

[16] Affirmed.

Vaidik, J., and Pyle, J., concur.

[2] Given our holding, we need not consider the trial court's alternative rationale in entering judgment for Costco under Trial Rule 12(B)(1).