STATE OF MICHIGAN

COURT OF APPEALS

SHEILA LOGAN KENDRICK,

Plaintiff-Appellant,

v

RITZ-CARLTON HOTEL CO., L.L.C., and MARRIOTT INTERNATIONAL, INC.,

Defendants-Appellees,

and

FORD MOTOR LAND DEVELOPMENT CO. and MARK PAYNE,

Defendants.

UNPUBLISHED
July 27, 2006

No. 256696
Wayne Circuit Court
LC No. 02-2332542-NO

Before: Davis, P.J., Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting summary disposition to defendant Ritz-Carlton Hotel. We affirm.

I. Background

Plaintiff and her young daughter were guests of defendant hotel after a fire destroyed her home. Plaintiff moved into the hotel on September 9, 2000. On September 15, 2000, sometime in the late afternoon, a basket of fruit and cookies was delivered to plaintiff's room. A short time later, plaintiff received a phone call from a hotel employee. He identified himself as Mark Payne and asked if she had received the gift, indicating that the hotel had sent it as a condolence for the plaintiff's plight. Payne and the plaintiff talked for several minutes.

Plaintiff testified that she was ill with a headache. She took a shower. As she left the shower and was dressing, she heard a knock at her door. Believing that it was a friend, family member, or her boyfriend, plaintiff answered the door wearing a robe with only panties and bra under it. Plaintiff was startled to find defendant Payne at her door in a hotel uniform. Payne had massage oils and lotions and offered plaintiff a massage for $75. She initially declined because

she had a headache. Payne said that a massage would ease her headache, and plaintiff allowed Payne into her room.

Payne turned down the lights. Plaintiff removed her robe and laid face down on the bed. Payne proceeded to massage her temples, head, neck, and shoulders. He also massaged her back and legs but did not touch her buttocks. Plaintiff turned over and, while she was on her back, she dozed briefly. She was awakened by Payne performing oral sex on her and the simultaneous ringing of the telephone. Plaintiff pushed Payne off her and answered the call. As she talked to her boyfriend, Payne quickly left the room.

Plaintiff did not report Payne's assault for several days. She told a friend, who was a hotel employee, and a housekeeping supervisor, Clara Treadwell. Ms. Treadwell gave the plaintiff names and numbers of persons to whom Payne's misconduct might be reported. Plaintiff testified that she was concerned about her relationship with her boyfriend, very stressed about the loss of her home and her belongings, and feared going to the police because of everything else that was happening in her life. When defense counsel pressed her further, plaintiff said that she had been sexually molested as a child and that fact was a further reason that she made no report to the defendant's management or the police.

In depositions and documents defendant asserted that it was careful in hiring Payne. Defendant relied on Payne's application, a resume, and testing, and it also did extensive interviewing before Payne was hired. However, defendant's staff had discussed the need for background investigation of prospective employees for years before implementing background checks in 2002. Defendant required Payne to authorize a background check before his employment, but it did not conduct a background check. The checks that were done by defendant's staff consisted of calling a few former employers. The former employers gave only job descriptions and the dates that they employed Payne. All former employers that were contacted refused to give useful information to defendant's employees.

Other evidence showed that Payne had been convicted of a sexual offense and that he had registered as a sex offender under Michigan's Sex offenders Registration Act, MCL 28.723, before his employment by defendant.

Plaintiff's suit alleged that defendant was negligent in hiring Payne in that it knew or should have known that he had been previously convicted of a sex crime. The complaint urged that defendant either should have better trained Payne or prohibited him from contact with hotel patrons. The complaint also alleged that defendant clothed Payne with apparent authority to give massages to hotel guests and, as a consequence, put him in a position where he could assault plaintiff.

The trial court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10), stating,

> There is nothing under respondeat superior, negligent hiring or nothing else, sir, that can cause Ritz-Carlton under these factual situations to be liable for [Payne]. . . . I find no factual situation considering everything that was said that would get you to a jury. . . . I'm giving it (C)(10), no question of fact . . . .

II. Standard of Review

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. *Id.* A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

The existence of a duty is a question of law for the court to decide. *Brown v Brown*, 270 Mich App 689, 694; ___ NW2d ___ (2006). If the question of duty involves no disputed factual issues, and the court concludes that a defendant owes the plaintiff no duty, summary disposition is proper. *Cook v Bennett*, 94 Mich App 93, 98; 288 NW2d 609 (1979). We review de novo a trial court's determination whether a defendant owes a duty toward a plaintiff. *Ghaffari v Turner Construction Co (On Remand)*, 268 Mich App 460, 465; 708 NW2d 448 (2005).

III. Discussion

Plaintiff's claims against defendant are twofold: first, defendant was negligent in hiring and supervising Payne, and, second, defendant is vicariously liable for Payne's intentional tort because he was aided in its accomplishment by his agency relationship with defendant.

A. Negligent Hiring

We first discuss plaintiff's negligence claim. To prevail in a negligence claim, a plaintiff must prove four elements: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "[A] negligence action may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002). Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. *Moning v Alfono*, 400 Mich 425, 438-439; 254 NW2d 759 (1977). The existence of a duty depends in part on foreseeability, i.e., whether it was foreseeable that the actor's conduct may create a risk of harm to the victim. *Goldman v Phantom Freight, Inc*, 162 Mich App 472, 481; 413 NW2d 433 (1987).

> The questions of duty and proximate cause are inter-related because the question whether there is the requisite relationship, giving rise to a duty, and the question whether the cause is so significant and important to be regarded a proximate cause both depend on foreseeability—whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable. [*Moning, supra* at 439.]

In determining whether a duty exists, courts consider many different variables, including:

> (1) foreseeability of the harm, (2) degree of certainty of injury, (3) existence of a relationship between the parties involved, (4) closeness of connection between the conduct and injury, (5) moral blame attached to the conduct, (6) policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. The mere fact that an event may be foreseeable is insufficient to impose a duty upon the defendant. [*Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997) (citations omitted).]

In general, there is "no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party." *Graves, supra* at 493. "The rationale underlying this general rule is the fact that '[c]riminal activity, by its deviant nature, is normally unforeseeable.'" *Id.*, quoting *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989). Social policy, however, has led courts to recognize an exception to this general rule where a "special relationship" exists between a plaintiff and a defendant. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). The duty to protect arising from a "special relationship" is based on control; where one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself, the duty to protect is imposed upon the person in control because he is best able to provide a place of safety. *Id.*

Although Michigan law recognizes a "special relationship" between an innkeeper and guest, *Graves, supra* at 494; *Marcelletti v Bathani*, 198 Mich App 655, 664; 500 NW2d 124 (1993), actual or constructive knowledge on the part of the defendant of some danger to be protected against is usually a critical factor in determining whether a special relationship exists. See *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 403-406; 224 NW2d 843 (1975). This is related to the requirement of foreseeability because foreseeability depends on knowledge. *Id.* at 405.

In *Tyus v Booth*, 64 Mich App 88, 89; 235 NW2d 69 (1975), Flozelle Nails, an employee at a service station owned by the defendant Tom Booth, committed unprovoked assaults on the plaintiffs, Bernard and Robert Tyus. Apparently, Nails had a criminal record. *Id.* at 91. However, there was no evidence that Booth actually knew of Nails' prior assault convictions. *Id.* The trial court dismissed the Tyuses' negligence action, and this Court upheld that dismissal, holding that an employer is not obliged to "conduct an in-depth background investigation of his employee" to discover whether there is a history of violent propensities. *Id.* at 92. Rather, "[t]he duty is to use reasonable care to assure that the employee *known to have violent propensities* is not unreasonably exposed to the public." *Id.* (emphasis added). Because "there was no evidence that the defendant had actual knowledge of prior assault convictions of the employee," *id.* at 91, the Court concluded that "there was no evidence from which jurors could have reasonably concluded that defendant had notice of his employee's propensity for violence," *id.* at 93.

Here, the only documentary evidence that supported plaintiff's argument that Payne's actions were foreseeable was the affidavit of John T. Adams, which states that Payne is a registered sex offender in Michigan. However, the mere fact that the sexual offender registry is a public record does not create in defendant a "legal duty to keep abreast of such records and to act

preventively upon finding . . . transgressions of [its] employee[s]." *Tortora v General Motors Corp*, 373 Mich 563, 567; 130 NW2d 21 (1964). Moreover, "the mere fact that a person has a criminal record, even a conviction for a crime of violence, does not in itself establish the fact that that person has a violent or vicious nature so that an employer would be negligent in hiring him to meet the public." *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 415; 189 NW2d 286, (1971).

The dissent disagrees with our reliance on this Court's decision in *Tyus* for several reasons, which we will address presently. While we acknowledge that *Tyus* is not binding precedent because it was decided before November 1, 1990, MCR 7.215(J)(1), we nonetheless find the Court's reasoning persuasive and applicable. Although plaintiff does not allege defendant had a duty to "conduct an *in-depth* background investigation of [its] employee," the only duty with regard to background checks that defendant was under was to take the "usual and reasonable steps before employing [Payne]." *Bradley v Stevens*, 329 Mich 556, 563; 46 NW2d 382 (1951). Here, defendant not only relied on Payne's application, resume, and testing, but it also did extensive interviewing of Payne's previous employers before hiring him. Plaintiff has presented no evidence to support her claim that such a background check was unreasonable.

Further, we do not agree that there is any significant difference between Payne's exposure to the public as a housekeeping supervisor and Nails' exposure to the plaintiff in *Tyus* such as to justify a different legal standard for their employers. The dissent emphasizes the fact that, although "Michigan law generally recognizes that innkeepers and their patrons have a 'special relationship,' . . . [g]asoline stations have no such recognized special relation ship with the public." Post at ___. Michigan courts, however, have also recognized a "special relationship" between "business invitors or merchants [and] their business invitees," *Graves, supra* at 494 (citations omitted), which could as easily be extended to the parties in *Tyus* as to the parties in the present case. The "special relationship" between plaintiff and a defendant, however, does not arise automatically based on the parties' status toward one another, but rather a court must determine that the circumstances are such that social policy demands it recognize the "special relationship" because the party in control is best able to provide a place of safety. See *Williams, supra* at 498-499; *Graves, supra* at 494-501, 502.

Here, although Payne may have had access to hotel room keys, which he arguably could have used to force his way in to plaintiff's hotel room,[1] he simply knocked on plaintiff's door, which any member of the public could have done. Under the circumstances of this case, plaintiff, and not defendant, was in the best position to guard against the potential harm. Thus, the entrustment to the control and protection of another and the corresponding loss of the ability to protect oneself, which provide the basis for finding a special relationship between an innkeeper and guest, *Williams, supra*, was not the basis for the alleged harm in this case. Moreover, defendant had no actual or constructive knowledge of some danger to be protected against that plaintiff did not, so as to justify the existence of a special relationship. See *Samson,*

---

[1] Cf. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 224-225; 716 NW2d 220 (2006), discussing *Costas v Coconut Island Corp*, 137 F3d 46 (CA 1, 1998).

supra at 403-406. In the context of "special relationships," the "duty of reasonable care [extends] toward only those parties who are 'readily identifiable as [being] foreseeably endangered.'" *Graves, supra* at 494 (citations omitted). Because neither the result of defendant's hiring Payne (that he would gain entry to a guest's hotel room by offering an in-room massage and then sexually assault the guest) nor the intervening cause (that plaintiff would voluntarily allow a man carrying a basket of oils into her room to give her a massage on her bed while wearing only her bra and panties) was foreseeable, we hold that the trial court did not err in finding that there was no duty in this case. *Moning, supra* at 438-439.

Finally, we believe that the holding in *Tyus* does not conflict with the holdings in *Brown, supra*, or *Hersh, supra*. *Hersh* is factually distinguishable from both *Tyus* and the present case because, there, "the employer defendant did learn of a prior criminal record during the time of his employment." *Hersh, supra* at 413. As this Court stated in *Brown*,

> under *Hersh*, with respect to an employee with a criminal record, possibly even involving a "crime of violence," *about which the employer had some knowledge*, "[w]hether the employer knew or should have known of [an employee's] vicious propensities should not be determined by any court as a matter of law, but by the jury." [*Brown, supra* at 695 (alteration in original, emphasis added).]

In the case before us, the deposition testimony of the two hotel employees that plaintiff submitted clearly establishes that the hotel had no knowledge of Payne's prior conviction because the hotel never performed a background check. Under *Tyus, supra* at 92, the hotel had no duty to perform a background check, and knowledge of Payne's name on the sex offender registry is not imputed to it. Additionally, none of the factors in *Terry, supra* at 424, weigh in favor of finding a duty to do a background check under these circumstances. There simply was "no evidence from which jurors could have reasonably concluded that defendant had notice of [Payne's] propensity for violence," *Tyus, supra* at 93, and, thus, no evidence from which a jury could conclude that defendant breached its duty to plaintiff by unreasonably exposing Payne to the public.

B. Vicarious Liability

Plaintiff has also alleged that defendant is vicariously liable for Payne's intentional tort because defendant clothed Payne with apparent authority to give massages to hotel guests. Plaintiff urges that, despite Payne acting outside the scope of his employment, defendant is liable because the agency relationship between Payne and defendant aided Payne in sexually assaulting her. We disagree.

Under the doctrine of respondeat superior, the general rule is that an employer is not liable for the torts intentionally or recklessly committed by an employee when those torts are beyond the scope of the employer's business. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 221; 716 NW2d 220 (2006), citing *Bradley, supra* at 562. Specifically, an employer is ordinarily not liable for the criminal actions of an employee because those acts are outside of the scope of employment. *Salinas v Genesys Health Sys*, 263 Mich App 315, 317; 688 NW2d 112 (2004). Plaintiff relies on 1 Restatement Agency, 2d, § 219(2)(d) for the assertion that a principal is liable if the agent is aided in the accomplishment of a tort by the existence of the agency relationship. Our Supreme Court, however, flatly rejected the application of § 219(2)(d) as an

exception to the rule of respondeat superior employer nonliability. *Zsigo*, *supra* at 231. As Payne clearly acted outside the scope of his employment when he allegedly sexually assaulted plaintiff, defendant is not vicariously liable for Payne's actions.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot