STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL PAQUIN,

Plaintiff-Appellant,

v

GREGORY COMPANY, INC., d/b/a SHAKER'S LOUNGE,

Defendant-Appellee.

UNPUBLISHED
May 31, 1996

No. 175589
LC No. 93-312356-NO

Before: Taylor, P.J., and Fitzgerald and P.D. Houk,* JJ.*

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of a directed verdict in favor of defendant. We reverse and remand for a new trial.

Plaintiff and three companions, Smerka, Fitzgerald, and Ferrence, went to defendant Shaker's Lounge to watch topless dancers and drink. After approximately two hours in the bar, Smerka got up to leave. An altercation then arose between Smerka and Ferrence, and Ferrence left the bar. Smerka followed Ferrence out of the bar, followed by Fitzgerald. Plaintiff remained in the bar looking for his keys. Unable to locate the keys, plaintiff went outside. He acquired the keys from Smerka, and both plaintiff and Smerka walked toward plaintiff's car. Plaintiff arrived at the car and opened the car door. At this point, Smerka and Murphy, a bouncer from Shaker's, became engaged in a shouting match. Smerka began walking toward Murphy while screaming at him. Plaintiff noticed that both men had guns.

Smerka began to move toward Murphy, then apparently changed his mind and began walking away. Smerka then made a move as if to hide behind a car. Plaintiff then heard gunfire. When he looked back, plaintiff observed Smerka lying on the ground. Both plaintiff and Murphy proceeded to walk toward Smerka, who was not moving. Plaintiff then indicated that he was going to make a telephone call, and Murphy said, "You ain't going nowhere" and punched plaintiff in the face.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Ferrence then returned to the parking lot. Murphy instructed Ferrence and plaintiff not to touch the gun or Smerka. Plaintiff once again pleaded to make a phone call and offered his car keys and wallet to Murphy. Murphy again hit plaintiff after plaintiff once again indicated that he needed to make a telephone call. Murphy then had Ferrence hold plaintiff's arms behind his back until the police came shortly thereafter.

Plaintiff was taken to Detroit Receiving Hospital, where he was examined, a CAT scan and x-rays were taken, and some drops were put into his eyes. Plaintiff testified that he could not breathe properly through his nose or see out of his right eye because it was swollen shut. His face was bruised and swollen and he had a massive headache.

Plaintiff testified that his head was swollen and bruised until after surgery some weeks later. He underwent surgery on December 29, 1992, to repair a fracture to his eye socket, and had further surgery in April 1993 to alleviate breathing problems. Plaintiff indicated that he currently had problems with double vision when looking up or to the right, and suffered alternately from facial numbness and hypersensitivity when touched on the face.

Plaintiff filed suit against defendant raising claims of negligence, respondeat superior, intentional infliction of emotional distress, assault and battery, nuisance, false arrest, and false imprisonment. At the close of plaintiff's proofs, defendant moved for and was granted a directed verdict and the case was dismissed.[1]

Plaintiff first claims that the trial court erred in directing a verdict for defendant because an issue of fact existed regarding whether Murphy was acting within the scope of his employment when he struck plaintiff. We agree.

In deciding whether to grant a motion for directed verdict, the trial court must view the testimony and all legitimate inferences in the light most favorable to the nonmoving party to determine whether a prima facie case was established. *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994). When the evidence could lead reasonable jurors to disagree, the court may not grant a motion for directed verdict. *Davis v Wayne Co Sheriff*, 201 Mich App 572, 579; 507 NW2d 751 (1993).

In deciding whether a trial court erred in granting a motion for directed verdict, this Court reviews all the evidence presented up to the time of the motion to determine whether a question of fact existed. In doing so, this Court views the evidence in the light most favorable to the nonmoving party, grants them every reasonable inference, and resolves any conflict in the evidence in their favor. *Morrow v Boldt*, 203 Mich App 324, 327; 512 NW2d 83 (1994).

Under the doctrine of respondeat superior, an employer is generally liable for an intentional tort of his employee if the tort was committed in the course of and within the scope of the employment. *Green v Shell Oil Co*, 181 Mich App 439, 446; 450 NW2d 50 (1989). An employer is not liable if the employee's tortious act is committed while the employee is working for the employer but the act is

outside his authority, such as where the employee "steps aside from his employment to gratify some personal animosity or to accomplish some purpose of his own." *Id.* at 446-447. An employer's liability may also be based upon a finding that the employee acted within the apparent scope of his employment. *Leitch v Switchenko*, 169 Mich App 761, 765; 426 NW2d 804 (1988). Generally, the trier of fact determines whether an employee was acting within the scope or apparent scope of his employment. *Id.* at 765-766.

Here, plaintiff contends that Murphy was acting within the scope of his employment as a bouncer at Shaker's when he assaulted plaintiff. In support of his argument, plaintiff cites *Stewart v Napuche*, 334 Mich 76; 53 NW2d 676 (1952), and *Guipe v Jones*, 320 Mich 1; 30 NW2d 408 (1948). In *Stewart*, the Court stated that "if the servant uses more force than he was authorized to use in evicting a party from his master's premises, the master is liable." *Stewart, supra* at 79. The Court quoted, with approval:

> "The master who puts the servant in the place of trust or responsibility or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion goes beyond the strict line of his duty or authority and inflicts unjustifiable injury upon another." [*Id.* at 79-80 (quoting *Robards v P Bannon Sewer Pipe Co*, 113 SW 429 (Ky App, 1908)).]

The *Stewart* Court affirmed the trial court's determination that the bar owner was liable for the injuries inflicted upon a patron by the bartender when ejecting the patron from the premises, even though the bartender used more force than was necessary.

In *Guipe*, the Court affirmed a jury verdict in favor of the plaintiff. The defendant bar owner was found liable for the plaintiff's injuries when a bartender employed by the defendant hit the plaintiff in the face, causing permanent loss of sight in one eye. The bartender was attempting to force the plaintiff to pay for a drink that was served to the plaintiff. A waitress at the bar stated that it was one of the bartender's duties "to see to it that patrons paid the waitresses for drinks served." *Id.* at 3.

Here, defendant and the trial court relied on *Watson v Aquinas College*, 83 Mich App 192, 193; 268 NW2d 342 (1978), for the proposition that an employer is not vicariously liable for the wrongful act of an employee who was acting outside the scope of his employment. In *Watson*, security guards for the defendant security agency set fire to a building on the campus of Aquinas College in order to avoid having to do rounds in that building. The fire resulted in damage to plaintiff's personal property. The defendant agency was found not to be vicariously liable for the conduct of the security guards because they were clearly not acting within the scope of their authority. *Id.* at 193.

The facts of the present case are more akin to *Stewart* and to *Guipe* than they are to *Watson*. In the former cases, the employee's acts could reasonably have been construed to be within the scope

of the employment, while in *Watson* the act of arson could not reasonably have been construed to be within the scope of the employment. Viewed in the light most favorable to the plaintiff, the evidence in the present case revealed that Murphy was the bouncer at Shaker's and that his duties included "keeping the peace" in the bar. A bartender at Shaker's testified that Murphy was to "take care of any altercation or fight which occurred in the bar." An agent for the dancers testified that the bouncers at Shakers performed "normal bouncer jobs," which included "walking through the bar checking customers [and] watching the parking lots." The owner of the bar testified by deposition that it was reasonable and necessary to provide a safe environment for his patrons. He testified that, due to the nature of the business, some patrons might become unruly and it would be necessary to intervene to protect other patrons and the dancers. The evidence revealed that a fight did, in fact, occur in the bar and that one of the men involved in the fight followed the other man involved in the fight out of the bar. A reasonable inference could be drawn that Murphy followed the men into the parking lot in an effort to ensure that the altercation did not continue.

This evidence was sufficient to create a factual question regarding whether Murphy was acting within the scope of his employment when he followed the men outside and when he struck plaintiff while attempting to keep plaintiff from leaving the scene after the shooting. Because Murphy's action could reasonably be construed as an attempt to further his employer's business interests, the trial court erred in granting a directed verdict for defendant.

Plaintiff also contends that the trial court erred in directing a verdict of his claim of negligent hire. It is not absolutely clear from the trial court's comments at trial the grounds on which the trial court directed a verdict of the claim of negligent hire. It appears, however, that the trial court was confused regarding defendant's theory of negligence and simply held that plaintiff had not adequately pleaded his theory of negligence.

In his complaint, plaintiff alleged, in part, that:

> Defendants had a duty to their invitees and others coming onto the premises, including Plaintiff, to use reasonable care under the circumstances, and, notwithstanding such duty, did breach the same in the following manner:
>
> a. in hiring persons with dangerous propensities;
>
> b. in failing to adequately investigate the background and history of "bouncers" prior to employment.

Clearly, one basis for plaintiff's claim of negligence was that defendant knew or should have known of Murphy's violent propensities and therefore is liable for the injuries sustained by plaintiff when he was struck by Murphy.

In *Hersh v Kentfield Builders, Inc,* 385 Mich 410, 412; 189 NW2d 286 (1971), the Court stated that:

> An employer who knew or should have known of his employee's propensities and criminal record before the commission of an intentional tort by [an] employee upon [a] customer who came to [the] employer's place of business would be liable for damages to such customer.

In *Hersh*, there was a question whether the employer knew of his employee's prior criminal record and, hence, his violent tendencies. Similarly, in *Burch v A & G Assoc, Inc*, 122 Mich App 798, 807; 333 NW2d 140 (1983), a taxicab driver assaulted the plaintiff as the plaintiff exited the taxicab. The Court held that there was a question of fact regarding whether the employer knew of his employee's "dangerous propensities."

Here, ample evidence was presented that defendant knew of Murphy's propensity toward violence to withstand a motion for directed verdict. Testimony was presented that Murphy, a former Detroit police officer who may have been retired for being involving in too many shootings, was a member of a motorcycle gang that was known to be violent and dangerous. Testimony was also presented that Murphy was hired as a bouncer at Shaker's to prevent him from causing trouble in the bar as a patron. Two witnesses testified that they were afraid of Murphy and that they feared repercussions as a result of testifying at trial. Another witness testified that Murphy was "not stable." Because reasonable minds could differ regarding whether defendant knew or should have known of Murphy's violent propensities, the trial court erred in directing a verdict for defendant on plaintiff's claim of negligence.

Plaintiff also contends that the trial court abused its discretion in refusing to admit into evidence the deposition testimony of Billie Lintz. Although we need not reach this issue, we will briefly address it to provide guidance to the trial court on remand.

The decision to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). Plaintiff sought to admit the deposition testimony of Billie Lintz, a dancer at Shaker's, who had been deposed on January 10, 1994, but had since moved to South Carolina. As proof that Lintz was no longer living in Michigan, plaintiff presented the court with the affidavit of the process server, which indicated that he had been unable to serve a subpoena upon Lintz at her last known address and that her former landlord had stated that Lintz had moved to South Carolina. Plaintiff also presented evidence from the post office of a forwarding address in South Carolina. The trial court held that plaintiff failed to present sufficient evidence that Lintz was absent from the jurisdiction so as to declare her unavailable.

MCR 2.308 provides that a deposition, or any part thereof, shall be admissible at a trial as provided for in the Rules of Evidence. MRE 804(a)(5) provides that a declarant is unavailable as a witness if he or she:

> is absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means. . . .

With regard to deposition testimony, MRE 804(b)(5)(a) provides that a witness is unavailable if:

> The witness is at a greater distance than 100 miles from the place of trial or hearing or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition.

Here, the evidence presented indicated that the process server was unable to serve Lintz and that she had moved to South Carolina. Therefore, her deposition testimony was admissible under both MRE 804(a)(5) and MRE 804(b)(5)(A), and the trial court abused its discretion in refusing to admit Lintz' deposition testimony into evidence at trial. The trial court also erred in concluding that Lintz' testimony would have been cumulative. Murphy's role at the bar was central to the issue of whether he was acting within the scope of his authority when he punched plaintiff. Although two witnesses had described briefly some of the duties performed by Murphy at Shaker's, plaintiff's counsel indicated that Lintz discussed Murphy's role as a bouncer as well as the "dangerousness of the environment [and] the lack of supervision" at the bar. Thus, the testimony may have shed more light on the scope of Murphy's employment. Hence, we conclude that the trial court erred by failing to admit Lintz' deposition testimony into evidence and that the error was not harmless. MCR 2.613(A).

Reversed and remanded for a new trial.

/s/ Clifford W. Taylor
/s/ E. Thomas Fitzgerald
/s/ Peter D. Houk

[1] On appeal, plaintiff challenges only the dismissal of his claims of respondeat superior and negligence.