

STATE OF MICHIGAN
COURT OF APPEALS

SHELIA LOGAN KENDRICK,

Plaintiff-Appellant,

v

RITZ-CARLTON HOTEL COMPANY, LLC and
MARRIOTT INTERNATIONAL, INC.,

Defendants-Appellees,

and

FORD MOTOR LAND DEVELOPMENT
COMPANY and MARK PAYE,

Defendants.

UNPUBLISHED

July 27, 2006

No. 256696

Wayne Circuit Court

LC No. 02-2332542-NO

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

DAVIS, J. (*concurring in part and dissenting in part*).

I agree with the majority's recitation of the facts and disposition of the respondeat superior issue. I respectfully disagree with the majority's treatment of the negligent hiring issue.

A negligence claim requires plaintiff to prove that defendant owed her a duty, that defendant breached that duty, and that the breach caused her harm. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "Generally, an individual has no duty to protect another who is endangered by a third person's conduct." *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997). However, there are exceptions to the general rule of no duty. Our Supreme Court has recently reaffirmed that employers are "subject to liability for their negligence in hiring, training, and supervising their employees." *Zsigo v Hurley Medical Center*, 475 Mich 215, 227; ___ NW2d ___ (2006).

Relevant here, "an employer may share liability for intentional torts committed by an employee who is acting beyond the scope of employment if the employer knew, or should have known, of the employee's violent propensities." *Brown v Brown*, 270 Mich App 689, 694; ___ NW2d ___ (2006), citing *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412-413; 189 NW2d 286 (1971). There is no dispute here that defendant did not actually know that Payne was dangerous. The question, then, is whether defendant *should* have known of Payne's dangerous

propensities. Under the circumstances, this essentially means that the question is whether defendant *should* have conducted a meaningful background check.

The majority acknowledges, as it must, that there exists a “special relationship” between an innkeeper and the innkeeper’s guest where there is some degree of “readily identifiable” foreseeable danger. *Graves v Warner Bros*, 253 Mich App 486, 494; 656 NW2d 195 (2002); *Marcelletti v Bathani*, 198 Mich App 655, 664-665; 500 NW2d 124 (1993). Foreseeability depends in large part on knowledge, but also “upon whether or not a reasonable man could anticipate that a given event might occur under certain conditions.” *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 405-406; 224 NW2d 843 (1975). Having acknowledged and recognized the existence of a duty, our Supreme Court explained that it prefers “leaving it to the jury to determine the ultimate questions which may impose liability, those of foreseeability, reasonableness and proximate cause.” *Id.*, 409. Doing so is consistent with this Court’s holding that “[w]hether the risk of harm from third-party criminal activity is foreseeable in a particular case is generally a question of fact for the jury.” *MacDonald v PKT, Inc*, 233 Mich App 395, 400; 593 NW2d 176 (1999), rev’d on other grounds 464 Mich 322 (2001).

Despite recognizing that innkeepers have a special relationship with their patrons, and recognizing the rationale of that policy, the majority would then apply a completely different rule in reliance on *Tyus v Booth*, 64 Mich App 88; 235 NW2d 69 (1975). Because *Tyus* was decided before November 1, 1990, it is not binding precedent, MCR 7.215(J)(1), and the majority properly acknowledges that it relies on *Tyus* only because it finds *Tyus* persuasive. I can agree with the statement in *Tyus* that an employer is not under an absolute duty “to conduct an in-depth background investigation of” any and all employees under any and all circumstances. *Tyus*, *supra* at 92. I disagree with the majority’s extrapolation of this principle into a rule that employers *never* have *any* duty to *attempt to discover* unknown facts, solely because the employer does not already have actual knowledge that those facts exist. I believe the majority’s approach eviscerates any question of whether an employer “should have known” of a danger and significantly alters the established legal obligations of an innkeeper.

The majority’s reliance on *Tyus* ignores the distinction between an innkeeper and a gasoline station owner. The majority acknowledges that Michigan law generally recognizes that innkeepers and their patrons have a “special relationship,” which is rational given that innkeepers are in the business of providing safe havens for people to reside in on a temporary basis of varying duration. Gasoline stations have no such recognized “special relationship” with the public. The innkeeper promotes a sense of safety and security within its facilities, and its business operation frequently dictates close contact between staff and guests, not uncommonly in the guests’ private quarters. By contrast, gasoline station owners do not promote that degree of fraternization between their employees and the general public. I believe the majority’s reliance on *Tyus* compares apples to oranges, both as a matter of law and as a matter of practical fact.

The majority would hold as a matter of law that, where an employer does not know, there is no reason why the employer should know. The majority’s reasoning encourages innkeepers to do nothing to screen their employees, in the hopes that complete ignorance will serve as a complete defense if bad things happen. I believe that improperly states the duty of care owed by those employers who have legally recognized special relationships with their patrons, and it impermissibly invades the providence of the jury as the finder of fact. I would not conclude that defendant was or was not under a duty to conduct a background check here, or whether or not

what was done was legally reasonable. Rather, I would reaffirm the long-standing principle that defendant had a duty to exercise reasonable care in hiring employees to work in a hotel environment. I would then leave it to the trier of fact to determine whether defendant actually breached that duty.

/s/ Alton T. Davis