

STATE OF MICHIGAN
COURT OF APPEALS

DOUGLAS MOORE,

Plaintiff-Appellee/Cross-Appellant,

v

DETROIT ENTERTAINMENT, L.L.C., d/b/a
MOTOR CITY CASINO,

Defendant-Appellant/Cross-
Appellee,

and

JOSE OSCAR MARTINEZ,

Defendant.

FOR PUBLICATION
May 27, 2008

No. 275157
Wayne Circuit Court
LC No. 04-424554-NO

Advance Sheets Version

Before: O’Connell, P.J., and Borrello and Gleicher, JJ.

O’CONNELL, P.J. (*dissenting*).

I respectfully dissent. In my opinion, the trial court erred when it failed to grant defendant’s motion for directed verdict regarding plaintiff’s 42 USC 1983 claim because private security guards are not state actors. The trial court also erred by adopting federal precedent as persuasive and rejecting the Michigan Supreme Court’s reasoning in *Grand Rapids v Impens*, 414 Mich 667, 670; 327 NW2d 278 (1982). I would reverse the decision of the trial court.

In order to maintain an action under § 1983, a plaintiff is required to establish that he or she was “deprived of a right secured by the Constitution or laws of the United States” and that the defendant was a “state actor,” i.e. acting under color of state law at the relevant time. *American Mfrs Mut Ins Co v Sullivan*, 526 US 40, 49; 119 S Ct 977; 143 L Ed 2d 130 (1999). “[M]erely private conduct, no matter how discriminatory or wrongful” will not support a § 1983 claim. *Id.* at 50 (internal quotation marks and citations omitted). The plaintiff bears the burden to show state action because it is an element of the claim. *Brentwood Academy v Tennessee Secondary School Athletic Ass’n*, 531 US 288, 308-309; 121 S Ct 924; 148 L Ed 2d 807 (2001). Accordingly, in order for plaintiff to maintain his § 1983 claim, he was required to establish that the casino’s private security officers were state actors.

The trial court held as a matter of law that the casino's private security guards were acting under color of state law by virtue of the fact that they were certified under MCL 338.1079, relying on *Romanski v Detroit Entertainment, LLC*, 428 F3d 629, 636 (CA 6, 2005). "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004) (citations omitted). On the other hand, Michigan Supreme Court cases on point are binding on lower courts, regardless of whether the lower courts agree with the decision. *Detroit v Vavro*, 177 Mich App 682, 685; 442 NW2d 730 (1989). In my opinion, it is clear that the trial court erred by not following the Michigan Supreme Court decision in *Impens*, because the logic behind the decision is controlling and dispositive of the issue.

In *Impens*, our Supreme Court impliedly determined that private security guards are not state actors simply because they are certified under MCL 338.1079. Indeed, at least one federal district court recognized this fact:

Plaintiff here has not identified any state or local legislation that confers broad police powers upon security personnel. In fact, Michigan's security guard licensing statute limits the powers of security guards. Pursuant to the statute, upon obtaining a license, a private security officer is granted "the authority to arrest a person without a warrant" to the same extent possessed by public police officers, but only when this officer "is on the employer's premises." Mich. Comp. Laws § 338.1080. This authority is further limited to the security guard's "hours of employment as a private security police officer and does not extend beyond the boundaries of the property of the employer." Mich. Comp. Laws § 338.1080.

The limited powers conferred under this statute do not convert private security guards into state actors. This has been confirmed by the definitive arbiter of the proper meaning of this statute, the Michigan Supreme Court. . . .

[In *Impens*, t]he Michigan Supreme Court held that the defendant had not identified any state action that would trigger the requirement of *Miranda* warnings. In so ruling, the Court specifically rejected the defendant's contention that "the licensing statutes which regulate private security guards demonstrate the requisite degree of state action to bring their activities under color of state law, subject to constitutional restraints." 327 N.W.2d at 281. Instead, the Court concluded that "we do not believe that the mere licensing of security guards constitutes sufficient government involvement to require the giving of *Miranda* warnings." 327 N.W.2d at 281. This Court, of course, is bound by the views of Michigan's highest court as to the extent of authority conferred under the Michigan security guard licensing statute. [*Smith v Detroit Entertainment, LLC*, 338 F Supp 2d 775,780-781 (ED Mich, 2004) (emphasis added).]

In my opinion, this is the better analysis, because it recognizes the implications of the logic behind *Impens* and gives the ruling of our state's highest court the deference the law requires. It is this case, and not *Romanski*, on which the trial court should have relied.

The majority attempts to avoid the application of *Impens* with immaterial distinctions. Specifically, the majority notes that our Supreme Court did not determine whether the security officers in the *Impens* case had been licensed and that the opinion made no reference to MCL 338.1080. A review of the opinion indicates that it was unnecessary for the *Impens* Court to determine whether the security officers were licensed. The Court “[did] not believe that the mere licensing of security guards constitutes sufficient government involvement to require the giving of *Miranda* warnings.” *Impens, supra* at 676. Accordingly, it was unnecessary for the Court to determine, or even mention, whether the security guards were licensed because the simple fact of licensure would not transform a private security guard into a state actor.¹

Similarly, the Court’s failure to reference MCL 338.1080 does not render *Impens* inapposite. MCL 338.1080 provides for a limited power of arrest to those security guards licensed under MCL 338.1079. Because the power to arrest under MCL 338.1080 is conferred solely by licensure under MCL 338.1079, if licensure alone does not constitute state action, then acknowledgment that licensure confers an arrest power is similarly insufficient. Importantly, in the instant case, plaintiff was not arrested, but voluntarily went with the security officers back to the casino’s security office. The security guards never exercised any power to arrest.² Accordingly, it must be simply the existence of this limited power of arrest pursuant to MCL 338.1080 that gave the security officers in the present case a police power traditionally and exclusively reserved to the state. Such a conclusion broadly confers “state actor” status to all security guards who are licensed under MCL 338.1080 and is at odds with *Impens*.

One of the men who aided in the apprehension in *Impens* was an off-duty deputy sheriff. The Court held that his presence did not constitute “color of law,” in part because he was off-duty and identified himself as a store employee. *Impens, supra* at 677. If the mere existence of arrest authority under MCL 338.1080 were sufficient to confer “state actor” status, there would be no logical basis for our Supreme Court’s holding that the off-duty deputy sheriff in *Impens* was not acting under color of law, because even off-duty, he still had the power to arrest. The holding of the United States Court of Appeals for the Sixth Circuit, sitting en banc, in *Chapman v Higbee Co*, 319 F3d 825 (CA 6, 2003), is similarly irreconcilable with the majority’s broad conclusion. The security guard in *Chapman* was “an off-duty sheriff’s deputy, wearing his official sheriff’s department uniform, badge, and sidearm.” *Id.* at 834. As a police officer, the security guard possessed plenary police power. Yet the *Chapman* court did not conclude that

¹ If state licensing were, in fact, all that was necessary to transform private individuals into state actors, state licensure of plumbers, beauticians, electricians, and even attorneys would transform their conduct into state action subject to a § 1983 claim. Our courts would be inundated with civil-rights litigation concerning bad haircuts, leaky plumbing, and faulty wiring.

² Both the jury verdict and the plaintiff’s testimony confirm that no false arrest occurred in this case. Plaintiff testified that he voluntarily went with the casino’s private security guards, and the jury found no cause of action on plaintiff’s false-arrest claim. The private security guards also testified that plaintiff was not under arrest. These facts are conclusive that no false arrest occurred, and, absent a false arrest, plaintiff’s allegation that defendants abused their statutory arrest powers is clearly meritless.

mere possession of that authority resulted in state action. Instead, it examined the specific actions taken by the security officer, which included a strip search, and noted that store policy mandated police involvement for such an action. *Id.* at 834-835. If the security guards in *Impens* and *Chapman* were not state actors, despite having been licensed by the state as police officers with full arrest powers, it is clear that licensure under MCL 338.1079 alone cannot transform the casino's private security guards into state actors in the present case.

The majority argues that because the security guards were licensed under MCL 338.1079, they had the power to arrest plaintiff pursuant to MCL 338.1080, and that because plaintiff was held in a room on the basis of this authority, the security guards acted under color of state law. Application of such reasoning to other Michigan statutes would result in absurd and unintended outcomes that would destroy the "state actor" requirement of § 1983 altogether. Under MCL 764.16, private persons are given the authority to make arrests under certain situations. Every security guard who is unlicensed and, therefore, without authority under MCL 338.1080, still has the limited power given to all private persons under MCL 764.16. Having received authority from the state to arrest, any security guard who locked someone in an office pursuant to that authority becomes a state actor, notwithstanding all the prior case law that finds such actions to be that of private individuals. See, e.g., *Lindsey v Detroit Entertainment, LLC*, 484 F3d 824, 827-828 (CA 6, 2007). The fact that a private person has the power to arrest does not transform the person into a state actor. Rather, it would be the exercise of that power that would create state action. That is why the presence of state action is "fact-specific, and . . . determined on a case-by-case basis." *Chapman, supra* at 834.

It takes very little imagination to envision the havoc that would result from the application of the majority's holding. Whether it is the licensed day-care provider who places a four-year-old child in "time-out" for hitting another child, or the licensed cab driver who refuses to let a passenger leave the cab until the fare is paid, the majority would conclude that because MCL 764.16 gives these private persons the power to arrest, they are state actors. Thousands of everyday private actions would be distorted into state action for which plaintiffs will seek monetary remedies from taxpayer funds and overwhelm our already burdened courts.

Because I find *Impens* controlling, *Romanski* is inapplicable, and the trial court erred in relying on it to deny defendant's motion for directed verdict. The simple fact of licensure under MCL 338.1079 cannot, does not, and should not transform private security guards into state actors. To hold otherwise expands state action to a point that strains credulity.

I would reverse the decision of the trial court.

/s/ Peter D. O'Connell