

STATE OF MICHIGAN
COURT OF APPEALS

MARIA MONTGOMERY,

Plaintiff-Appellee,

v

SHELBY & BELLE, L.L.C., d/b/a BALDWIN
TROIPI-TAN,

Defendant-Appellant,

and

ROBERT ARTHUR SCHULTZ,

Defendant.

UNPUBLISHED
September 22, 2005

No. 255278
Genesee Circuit Court
LC No. 02-074142-NZ

CHARLOTTE USTISHEN,

Plaintiff-Appellee,

v

SHELBY & BELLE, L.L.C., d/b/a BALDWIN
TROIPI-TAN,

Defendant-Appellant,

and

ROBERT ARTHUR SCHULTZ,

Defendant.

No. 255998
Genesee Circuit Court
LC No. 02-074392-NZ

MICHELLE LYNN SEFA,

Plaintiff-Appellee,

v

SHELBY & BELLE, L.L.C., d/b/a BALDWIN
TROIPI-TAN,

Defendant-Appellant,

and

ROBERT ARTHUR SCHULTZ,

Defendant.

LISA JEAN ELLIS and STEPHEN VAN ELLIS,

Plaintiffs-Appellees,

v

SHELBY & BELLE, L.L.C., d/b/a BALDWIN
TROIPI-TAN,

Defendant-Appellant,

and

ROBERT ARTHUR SCHULTZ,

Defendant.

LISA LYNN EVANS and FRED LEROY
EVANS,

Plaintiffs-Appellees,

v

SHELBY & BELLE, L.L.C., d/b/a BALDWIN
TROIPI-TAN,

Defendant-Appellant,

and

ROBERT ARTHUR SCHULTZ,

No. 255999
Genesee Circuit Court
LC No. 02-075015-NO

No. 256000
Genesee Circuit Court
LC No. 02-075064-NO

No. 256001
Genesee Circuit Court
LC No. 02-075065-NO

Defendant.

RANDIE KELLY and BRIAN KELLY,

Plaintiffs-Appellees,

v

SHELBY & BELLE, L.L.C., d/b/a BALDWIN
TROPi-TAN, PAUL L. BALDWIN, and BETTY
J. BALDWIN, d/b/a BALDWIN'S TROPi-TAN,

Defendants-Appellants,

and

ROBERT ARTHUR SCHULTZ,

Defendant.

No. 256002
Genesee Circuit Court
LC No. 03-075661-NZ

Before: Fitzgerald, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Defendants¹ appeal by leave granted from an order partially denying their motion for summary disposition in these consolidated appeals. We reverse and remand for entry of judgment in favor of defendants.

These consolidated cases arise out of defendant Robert Schultz's conduct in secretly videotaping plaintiffs while they were disrobed for purposes of tanning at defendants' tanning salon. Defendants had hired Schultz to paint the salon. During Schultz's final week of painting, he placed a video camera on top of a tanning hex, which is a stand-up apparatus in which a patron stands while tanning.

Plaintiffs filed separate complaints against defendants alleging various causes of action, including negligence, gross negligence, failure to warn, violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq.*, respondent superior, wanton misconduct, intentional

¹ Because defendant Robert Schultz is not a party to this appeal, reference to "defendants" refers to defendants Shelby & Belle, L.L.C., d/b/a Baldwin Tropi-Tan, and to Paul L. Baldwin and Betty J. Baldwin, individually, and d/b/a Baldwin's Tropi-Tan only.

infliction of emotional distress, invasion of privacy, and loss of consortium. The trial court denied in part defendants' motion for summary disposition that was brought under MCR 2.116(C)(10), finding that defendants could be held vicariously liable for Schutz's actions because Schultz was aided in accomplishing his tortious conduct by the existence of the agency relationship with defendants, that defendants retained the right to control Schultz's conduct, and that the MCPA claims were not "seriously addressed in the motion."

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Willis v Deerfield Twp*, 257 Mich App 541, 548; 669 NW2d 279 (2003). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id.* at 31.

Generally, a master is responsible for the wrongful acts committed by his servant while performing a duty within the scope of his employment. *Rogers v J B Hunt Transport, Inc*, 466 Mich 645, 650-651; 649 NW2d 23 (2002). An employer is not liable, however, for an employee's intentional torts committed outside the scope of employment. *Id.* at 651; *Salinas v Genesys Health System*, 263 Mich App 315, 317; 688 NW2d 112 (2004). An act is outside the scope of employment if the employee commits the act to accomplish some purpose of his own. *Green v Shell Oil Co*, 181 Mich App 439, 446-447; 450 NW2d 50 (1989), citing *Martin v Jones*, 302 Mich 355, 358; 4 NW2d 686 (1942). If it is apparent that the employee is acting to accomplish his own purpose, summary disposition is appropriate. *Green, supra* at 447.

In *Salinas*, this Court acknowledged that, pursuant to 1 Restatement Agency, 2d, § 219(2)(d), p 481, some jurisdictions have recognized an exception to the general rule of nonliability "where the employee 'was aided in accomplishing the tort by the existence of the agency relation.'" *Salinas, supra* at 318, quoting Restatement, 2d, § 219(2)(d). This Court stated that although the Michigan Supreme Court referenced Restatement, 2d, § 219(2)(d), in *Champion v Nationwide Security*, 450 Mich 702; 545 NW2d 596 (1996), "it is not at all clear that the exception . . . has been recognized in Michigan." *Id.*

Relying on *Champion, supra*, and Restatement, 2d, § 219(2)(d) cited therein, the trial court in the instant cases ruled that a question of fact exists regarding whether Schultz was aided in accomplishing his activities by the existence of an agency relationship with defendants. Thus, the trial court operated under the assumption that our Supreme Court has adopted Restatement, 2d, § 219(2)(d), as an exception to the general rule of nonliability. We agree with the *Salinas* Court that it is unclear whether the exception applies in Michigan. The *Salinas* Court stated:

Further, we question whether *Champion* generally "adopted" the Restatement exception to the usual rule that an employer cannot be held liable for torts intentionally committed by an employee. The only mention of the Restatement exception was made in passing in a footnote. In the course of rejecting the defendant's "construction of agency principles as far too narrow," the Court made a "see" reference to the Restatement exception. [Citation

omitted.] We are unconvinced that this constituted an adoption of the Restatement exception, especially for cases like the present one involving tort actions not at issue in *Champion*. [*Salinas, supra* at 320 (footnote omitted).]

As in *Salinas*, however, regardless of whether the exception has been adopted, the facts of these cases do not support application of the exception.

In *Salinas*, a male nurse employed by the defendant hospital while the plaintiff was a patient at the hospital sexually assaulted the plaintiff. *Salinas, supra* at 316. The plaintiff sued the hospital for assault and battery and intentional infliction of emotional distress on a vicarious liability theory under the doctrine of respondeat superior. *Id.* at 317. The hospital moved for summary disposition under MCR 2.116(C)(8), arguing that it was not liable for an employee's tortious act committed outside the scope of employment. *Id.* The plaintiff contended that Restatement, 2d, § 219(2)(d), applies in Michigan and that it applied to the facts of the case. *Id.* at 318. This Court held that regardless of whether the exception applies in Michigan, the facts did not support application of the exception. *Id.* at 320-321. The Court upheld the trial court's grant of summary disposition, relying on the reasoning of *Bozarth v Harper Creek Bd of Ed*, 94 Mich App 351; 288 NW2d 424 (1979), that an employee is not aided in accomplishing a tort by the existence of an agency relation merely because the employment situation offered an opportunity for tortious conduct.² *Id.* at 321. The *Salinas* Court adopted *Bozarth's* reasoning and held that since the plaintiff alleged only that the employment situation presented the nurse with the mere opportunity to sexually assault her, the plaintiff's allegations were insufficient to state a claim against the hospital, even if the Restatement exception applied. *Id.* at 323.

In *Bozarth*, this Court stated that the provision of Restatement, 2d, § 219(2)(d), regarding an employer's liability for an employee's tortious conduct if the employee "was aided in accomplishing the tort by the existence of the agency relation," applied only when, from the perspective of the victim, the agent appeared to have acted within the scope of his employment. *Bozarth, supra* at 354. In that case, this Court determined that a teacher's sexual assault on a student was "clearly outside the scope of the teacher's employment and outside the teacher's apparent authority." *Id.* at 355. This Court stated that "[t]he mere fact that an employee's employment situation may offer an opportunity for tortious activity does not make the employer liable to the victim of that activity." *Id.*

Under the reasoning of *Bozarth* and *Salinas*, even if Schultz is considered defendants' employee rather than an independent contractor, summary disposition was appropriate because the employment situation allowed Schultz only the mere opportunity to commit the tortious conduct. Schultz's agreement with defendants to provide painting services merely allowed him to be present in the salon in the areas where patrons tanned. He was not acting within the scope or apparent scope of his employment when he videotaped the salon's patrons. His employment

² The *Salinas* Court acknowledged that, although *Bozarth* was not precedentially binding, its reasoning was persuasive because it was supported by *Burlington Industries, Inc v Ellerth*, 524 US 742; 118 S Ct 2257; 141 L Ed 2d 633 (1998), and *Faragher v Boca Raton*, 524 US 775; 118 S Ct 2275; 141 L Ed 2d 662 (1998). *Salinas, supra* at 321.

involved painting, not videotaping. His employment situation thus offered the mere opportunity to commit the tortious conduct, and, as such, defendants cannot be held vicariously liable for his actions. *Id.* Thus, regardless of whether the Restatement exception applies in Michigan, summary disposition was appropriate to the extent that Schultz is considered an employee.

Notwithstanding the above analysis, both plaintiffs and defendants contend that Schultz was an independent contractor rather than an employee. Plaintiffs argue that because defendants retained control over Schultz's work, they may be held directly liable under the "retained control doctrine." In *Ormsby v Capital Welding, Inc.*, 471 Mich 45, 48, 53; 684 NW2d 320 (2004), the Michigan Supreme Court recognized the rule that property owners and general contractors are not generally liable for the negligence of independent contractors. See also *Reeves v Kmart Corp.*, 229 Mich App 466, 471; 582 NW2d 841 (1998). The Court also recognized, however, that under *Funk v General Motors Corp.*, 392 Mich 91, 104-105; 220 NW2d 641 (1974), overruled in part on other grounds *Hardy v Monsanto Enviro-Chem Systems, Inc.*, 414 Mich 29; 323 NW2d 270 (1982), a general contractor could be liable, in certain circumstances, under the "common work area doctrine," and that a landowner could be held liable in limited circumstances under the "retained control doctrine." *Ormsby, supra* at 48. In *Ormsby*, the Court clarified these two doctrines and opined that they are not two separate and distinct exceptions to the general rule of nonliability, but rather, the "retained control doctrine" is a subordinate doctrine of the "common work area doctrine." *Id.* at 55-56. The Court stated:

[T]he "retained control doctrine" is subordinate to the "common work area doctrine" and simply stands for the proposition that when the "common work area doctrine" would apply, and the property owner has stepped into the shoes of the general contractor, thereby "retaining control" over the construction project, that owner may likewise be held liable for the negligence of its independent contractors. [*Id.* at 60 (footnote omitted).]

Thus, the "retained control doctrine" applies only when an injured plaintiff can establish all four elements of the "common work area" exception. *Id.* These elements are:

(1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area. [*Id.* at 54.]

Plaintiffs admit that the language in *Ormsby* pertaining to the "retained control doctrine" applies in the context of a construction project. As can be seen from the above elements regarding the "common work area doctrine," that doctrine applies solely in the context of a construction project. Because the "retained control doctrine" applies only when a plaintiff can establish all four elements of the "common work area doctrine," it does not apply in the instant context. Even if the doctrine did apply, however, it is subordinate to the "common work area doctrine," which applies to injuries resulting from an independent contractor's *negligent* conduct. *Id.* at 55-56. The exception does not involve an independent contractor's *intentional* conduct. Because Schultz's conduct in videotaping the salon's patrons was intentional, the exception would not apply under these circumstances in any event.

Plaintiffs also alleged various theories of negligence on behalf of defendants, including the failure to provide a safe premises and the failure to warn of a potentially dangerous condition. Defendants correctly opine that these allegations advance a premises liability claim. Persons entering upon the property of another for business purposes are generally accorded invitee status. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). An “invitee” is a person who enters upon another’s land upon an invitation, which carries with it an implied representation that the landowner has exercised reasonable care in preparing the premises and making it safe for the invitee. *Id.* at 596-597. A landowner has a duty of care to warn the invitee of any known dangers and to make the premises safe, which requires the landowner to inspect the premises and, depending on the circumstances, to make any necessary repairs or warn invitees of any discovered hazards. *Id.* at 597. In order to hold defendants liable, plaintiffs must show either actual knowledge or constructive knowledge of Schultz’s activities. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979). It is undisputed that defendants did not have actual knowledge of Schultz’s activities. Thus, the question is whether defendants had constructive knowledge, i.e., whether the evidence would permit a jury to find that the condition existed long enough that defendants should have had notice of it. *Clark, supra* at 419; *Whitmore, supra* at 8.

No evidence suggests that defendants should have had notice of Schultz’s activities. Schultz began painting the salon in late November 2001, and finished the job in January 2002. He videotaped patrons over the course of three days during his last week at the salon. Thus, the activity did not occur throughout the entire time that Schultz painted the salon. In addition, he testified that he “always” laid his coat over the side of the hex unit, even during the time that he did not videotape patrons. Thus, Schultz laid his coat and a rag over the side of the hex unit for a substantial period of time before he hid the camera underneath the rag. Because he “always” laid these items over the side of the unit since he began painting the salon, defendants had no reason to suspect that he concealed a camcorder under the items on three occasions during his final week at the salon. The camcorder was always hidden underneath the paint rag. Given the limited amount of time that Schultz videotaped patrons and the fact that the camcorder was hidden under a rag that Schultz “always” laid on top of the hex unit, defendants had no reason to suspect his tortious activity. Accordingly, they did not have constructive notice of the condition on the premises, and the trial court should have granted defendants summary disposition on plaintiffs’ premises liability claims.

Defendants further contend that the trial court erred by denying their motion for summary disposition on plaintiffs’ claims of invasion of privacy, intentional infliction of emotional distress, gross negligence, and wanton misconduct. We agree. The common-law tort of invasion of privacy includes four separate theories, one of which is alleged in this case – “the intrusion upon another’s seclusion or solitude, or into another’s private affairs.” *Lewis v LeGrow*, 258 Mich App 175, 193; 670 NW2d 675 (2003). The intrusion upon seclusion theory contains three elements: (1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter through some method objectionable to a reasonable man.” *Id.*, citing *Doe v Mills*, 212 Mich App 73, 88; 536 NW2d 824 (1995). A claim of intrusion upon seclusion focuses on the manner in which the information was obtained rather than on the publication of the information. *Id.*

Defendants cannot be held liable for invasion of privacy based on an intrusion upon seclusion theory because plaintiffs cannot satisfy the third element requiring proof that defendants obtained information through some objectionable method. In fact, defendants obtained no information at all; rather, Schultz obtained information through objectionable methods. In *Doe, supra*, the defendants posted signs bearing the plaintiffs' names and indicating that the plaintiffs were about to undergo abortions. *Doe, supra* at 77. The plaintiffs sued the defendants for, inter alia, invasion of privacy on an intrusion upon seclusion theory. *Id.* at 79-80, 88. This Court held that because the plaintiffs' complaint alleged only the fact of disclosure and not any offensive intrusion, summary disposition was proper. *Id.* at 89. Likewise, summary disposition was proper in the instant cases. Because plaintiffs cannot establish any offensive intrusion by defendants, plaintiffs are unable to establish the elements of a prima facie case for intrusion upon seclusion.

Summary disposition in favor of defendants should also have been granted on plaintiffs' claims of intentional infliction of emotional distress. The elements of such a claim are: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Lewis, supra* at 196, citing *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999); *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 342; 497 NW2d 585 (1993). Liability attaches only when a plaintiff is able to demonstrate that the defendant's conduct is so outrageous and extreme that it surpasses all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized society. *Lewis, supra* at 196. Plaintiffs are unable to establish that defendants' conduct was extreme and outrageous to satisfy the above standard. In fact, nothing regarding their conduct can be considered remotely extreme or outrageous. They did not engage in the videotaping activities and had no knowledge of the activities. Moreover, they had no reason to suspect such activities. Thus, summary disposition for defendants was proper.

With respect to plaintiffs' common-law gross negligence claims, this Court must examine whether reasonable minds could differ regarding whether defendants' conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury resulted. *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003). Defendants did not engage in any reckless conduct that would have demonstrated a lack of concern for whether an injury resulted. Reasonable minds could not differ on this question. Therefore, summary disposition was appropriate.

Plaintiffs also alleged claims of wanton misconduct. Wilful and wanton misconduct requires:

(1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [*Taylor v Laban*, 241 Mich App 449; 616 NW2d 229 (2000), quoting *Miller v Inglis*, 223 Mich App 159, 166; 567 NW2d 253 (1997).]

Plaintiffs cannot establish their claims of wanton misconduct because no evidence suggests that defendants knew of Schultz's activities before a patron discovered them. Thus, plaintiffs cannot establish the first element regarding knowledge of a situation requiring the exercise of ordinary

care. Accordingly, the trial court should have granted defendants' motion for summary disposition on plaintiffs' claims of wanton misconduct.

Finally, defendants contend that they were entitled to summary disposition on plaintiffs' claims under the Michigan Consumer Protection Act ("MCPA"), MCL 445.901 *et seq.* MCL 445.903(1)(c) and (e) provide:

(1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:

* * *

(c) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he or she does not have.

* * *

(e) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.

Plaintiffs contend that defendants misrepresented that the tanning rooms were private and secure. To the extent that defendants made any such representations, their representations are not actionable under the MCPA. Such representations would have been based on the characteristics of the rooms in general and not on the condition of the rooms on the few days that, unbeknownst to defendants, Schultz was videotaping the salon's clientele. Defendants did not misrepresent the characteristics of the salon's services because they did not know that any representations of privacy were untrue. "The MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce and must be liberally construed to achieve its intended goals." *Forton v Laszar*, 239 Mich App 711, 715; 609 NW2d 850 (2000). Allowing plaintiffs to proceed under the MCPA would not achieve the intended goal of the act, i.e., to prohibit unfair practices in trade or commerce. Defendants did not intentionally misrepresent any quality of its services and engaged in no unfair trade practice. Rather, the criminal actions of a third party interfered with the normal characteristics of the salon's services. Schultz's conduct cannot be equated with a misrepresentation on behalf of defendants. Accordingly, the trial court should have granted summary disposition for defendants on plaintiffs' MCPA claims.

Reversed and remanded for entry of judgment in favor of defendants. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly