STATE OF MICHIGAN

COURT OF APPEALS

ELAINE CAWOOD and THOMAS J. CAWOOD, Co-Conservators of the Estate of Legally Incapacitated Person, JENNIFER CAWOOD,

Plaintiffs-Appellants,

v

RAINBOW REHABILITATION CENTERS, INC.,

Defendant-Appellee,

and

HARRY ERKINS, Jr., SHERI McDANIEL, HAROLD WILSON, OWEN PERLMAN and LISHA CLEVENGER,

Defendants.

FOR PUBLICATION
December 1, 2005
9:00 a.m.

No. 263146
Washtenaw Circuit Court
LC No. 03-001290-NO

Official Reported Version

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

SMOLENSKI, P.J.

Plaintiffs appeal as of right the circuit court's opinion and order granting defendant's motion for summary disposition under MCR 2.116(C)(10).[1] We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

[1] Defendant's motion was filed under MCR 2.116(C)(8), and (10). Although the trial court did not specifically state the subsection under which it was granting defendant's motion, because the trial court relied on matters outside the pleadings, we treated the motion as though granted pursuant to MCR 2.116(C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

This case arises from a sexual encounter between plaintiffs' daughter, Jennifer, and defendant's employee while Jennifer was a resident of one of the homes of defendant, Rainbow Rehabilitation Centers, Inc., for brain-injured individuals. After plaintiffs learned of the sexual encounter,[2] they filed suit against defendant, claiming vicarious and direct liability.[3] Defendant moved for summary disposition, and the trial court granted defendant's motion.

This Court reviews de novo the grant or denial of a motion for summary disposition. *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 a claim. *Id.* Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When determining whether there is a genuine issue as to any material fact, the trial court must consider the evidence presented by the parties in the light most favorable to the party opposing the motion. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). "Where the proffered evidence fails to establish a genuine issue regarding any 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).

Plaintiffs first argue that the trial court erroneously determined that defendant could not be held vicariously liable for the intentional tort of its employee. Consequently, plaintiffs further contend, summary disposition in favor of defendant on this issue was inappropriate. We disagree.

An employer is generally not responsible for an intentional tort "committed by its employee acting outside the scope of employment." *McClements v Ford Motor Co*, 473 Mich 373, 381; 702 NW2d 166 (2005). Plaintiffs do not contend that defendant's employee was acting within the scope of his employment when he had sexual relations with Jennifer.[4] Instead, plaintiffs argue that defendant may still be held vicariously liable for the actions of its employee under the exception set forth in 1 Restatement Agency, 2d, § 219(2)(d), p 481, because, even

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[2] Defendant's employee claimed the sexual encounter was consensual. Initially, Jennifer also claimed the encounter was consensual, but in her deposition she stated that she no longer considered it consensual. After reviewing the evidence, the trial court determined that there was a factual question concerning whether Jennifer was capable of consenting.

[3] Plaintiffs also sued Harry Erkins, Jr., the employee who engaged in inappropriate relations with Jennifer, in addition to several other employees of defendant. However, they are not parties to this appeal.

[4] Defendant actually had a policy explicitly prohibiting such conduct.

though he acted outside the scope of his authority, he was aided in accomplishing the tort by the existence of the agency relationship.[5]

Relying in part on *Champion v Nation Wide Security, Inc*, 450 Mich 702, 712 n 6; 545 NW2d 596 (1996), plaintiffs contend that Michigan has adopted the exception set forth in § 219(2)(d) of the Restatement. However, this Court has noted that it is unclear whether the exception applies in cases involving tort actions. See *Salinas v Genesys Health Sys*, 263 Mich App 315; 318-320; 688 NW2d 112 (2004) (questioning whether *Champion* adopted the Restatement exception).[6] Nevertheless, we need not determine whether the Restatement exception has been or should be adopted because, even if the Restatement exception were applicable, under the facts of this case defendant would still be entitled to summary disposition.

"This Court has held that an employee is not 'aided in accomplishing the tort by the existence of the agency relation,' under the Restatement exception, just because of the 'mere fact that an employee's employment situation may offer an opportunity for tortious activity . . . .'" *Id.* at 321, quoting *Bozarth v Harper Creek Bd of Ed*, 94 Mich App 351, 355; 288 NW2d 424 (1979). Rather, the Restatement exception will only apply where "the agency itself empowers the employee to commit the tortious conduct." *Salinas, supra* at 323. In this case, defendant's employee was not empowered to engage in the sexual conduct by the existence of the agency relationship. He did not use his authority or any instrumentality entrusted to him in order to facilitate the inappropriate encounter.[7] Instead, the existence of the employment relationship merely provided the employee with the opportunity to engage in the inappropriate conduct. Consequently, the Restatement exception would not apply.

Plaintiffs next argue that the trial court's grant of summary disposition was improper because defendant is directly liable to plaintiffs for its failure to adequately staff the group home. Again, we disagree.

"To establish a prima facie case of negligence, 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). However, there is nothing in the record to indicate that defendant's staffing policies were inherently inadequate.

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[5] Pursuant to Restatement § 219(2), "[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . (d) the servant . . . was aided in accomplishing the tort by the existence of the agency relation."

[6] We recognize that the Court in *Zsigo v Hurley Medical Ctr*, unpublished opinion per curiam of the Court of Appeals, issued May 4, 2004 (Docket No. 240155), lv gtd 472 Mich 899 (2005), concluded that the Restatement of Agency, 2d § 219(2)(d) applies to actions in tort. However, because it is unpublished, *Zsigo* is not binding on this Court. MCR 7.215(C)(1).

[7] Although *Zsigo* is not binding authority, we note that our conclusion is consistent with the Court's determination in that case that the tort committed by the employee must be accomplished by an instrumentality or through conduct associated with the employee's agency status. See *Zsigo, supra*.

Defendant's expert opined in his affidavit that defendant met all the standards required for the adult foster care industry and, under the applicable licensing rules, the group home was appropriately staffed for the number of residents it served. He further noted that the licensing rules allow a staff member of the opposite sex to provide personal care with the consent of the resident. In the present case, the resident care agreement between the parties clearly indicates that plaintiffs consented to the provision of personal care to their daughter by staff members of the opposite sex. Finally, while plaintiffs apparently rely on the fact that defendant's original schedule for the group home provided for two staff members on the night in question, defendant's human resources director explained that this was an allocation, not a requirement. She also testified that the final schedule would be based on the needs of that particular home, not the human resources allocation in the original schedule. Hence, plaintiffs failed to establish that defendant had a duty to staff the group home with more than one person or to have a female staff member on duty on the night in question.

Finally, plaintiffs argue that, because defendant was aware of their daughter's compulsive sexual behavior, defendant should not have permitted the employee to have been on staff alone with Jennifer. While defendant may have been aware of plaintiffs' daughter's decreased inhibitions, there was no evidence that defendant knew, or should have known, that its employee would take advantage of plaintiffs' daughter's condition.[8] Absent such knowledge, defendant cannot be held liable for permitting the employee in question to work alone in the company of plaintiffs' daughter. See *McClements, supra* at 381, citing *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412; 189 NW2d 286 (1971).

Therefore, we conclude that plaintiffs failed to raise a genuine issue of material fact as to their claims against defendant. Consequently, the trial court properly granted summary disposition in favor of defendant.[9]

Affirmed.

Schuette, J., concurred.

/s/ Michael R. Smolenski
/s/ Bill Schuette

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[8] Defendant conducted a background check on the employee in question. The employee had no criminal record, his references were favorable, and he successfully completed the requisite training and certification. Likewise, up until this incident, his employment history with defendant was good.

[9] While we are sympathetic to the dissent's desire to provide enhanced protections for incapacitated persons, we do not believe that this Court is the appropriate body for effecting this change. Rather, we conclude that such a change is best left to the legislative process. We encourage the Legislature to thoroughly review this important public policy matter.