STATE OF MICHIGAN

COURT OF APPEALS

EDWIN T. CHANDLER,

Plaintiff-Appellee,

v

MOTEL 6,

Defendant-Appellant.

UNPUBLISHED
February 13, 1998

No. 195137
Genesee Circuit Court
LC No. 94-031637-NO

Before: Bandstra, P.J., and Cavanagh and Markman, JJ.

PER CURIAM.

Plaintiff security guard, employed by defendant motel as an independent contractor, was beaten by patrons whom he was attempting to evict. Plaintiff filed a personal injury action against defendant. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that it had no duty to plaintiff. The trial court denied the motion, and defendant now appeals by leave granted. We reverse.

In September, 1992, plaintiff worked as a security guard for Hawk Security. Hawk by contract had agreed to provide security guards for defendant motel. Late one September night, plaintiff knocked on one of the motel doors and asked several unruly guests within to quiet down. The guests complied. But soon thereafter defendant motel's assistant manager contacted plaintiff via walkie-talkie. She told him that she had received complaints about noise and requested that he evict the guests. Plaintiff returned to the room and, when the guests opened the door, he could see six to eight people within. In his deposition, plaintiff testified that several of these individuals came out of the room and told him that he was "just a security guard." Plaintiff then used the walkie-talkie to contact the assistant manager to ask her to call the police. He testified that the assistant manager responded, "Okay, I'm calling the Flint police right now." However, the assistant manager did not call the police. In her deposition, the assistant manager testified that plaintiff canceled his request for the police before she could finish dialing 9-1-1. Plaintiff denied making any such cancellation.

At that point, one of the guests said they would leave but that he wanted a refund. Plaintiff escorted him to the office. The assistant manager informed the guest that it was against defendant's policy to refund money to evicted guests. The guest angrily threw his keys in the dish beneath the glass partition. When the guest left, the assistant manager told plaintiff to follow him out to "make sure that they leave." When plaintiff did so, the other guests surrounded him and beat him.

This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

> MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id*.]

The threshold question whether a duty exists is a question of law for the court to decide. *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). Once a duty is found to exist the factfinder may determine whether, in light of the particular facts of the case, there was a breach of the duty. *Id*. at 53-54.

Generally, an entity that hires a security guard company has no duty to protect the security guard from acts of third parties.[1] In *Turner v Northwest General Hospital*, 97 Mich App 1; 293 NW2d 713 (1980), an employee of a security guard company was shot and killed while on duty as a security guard of a hospital. The plaintiff's decedent alleged ten areas of negligence, including failure to train, allowing plaintiff's decedent to accompany the unknown persons out of the establishment alone, and failure to aid plaintiff's decedent while he was being assaulted. The *Turner* Court affirmed summary disposition for the defendant and held, at 3-4:

> What happened to plaintiff's decedent was the very reason plaintiff's decedent and his employer were hired, i.e., to safeguard against criminal acts of violence. It would be ironic to hold defendant hospital liable to an employee of the very security guard company it hired for protection.

Carter v Mercury Theater Co, 146 Mich App 165; 379 NW2d 409 (1985) involved injuries to a security guard who was shot while on duty at a theater. The plaintiff alleged that the perpetrators regained access to the theater either by fire doors that lacked functioning locking mechanisms or through the front doors because theater employees failed to heed instructions not to permit readmittance to the patrons in question. The *Carter* Court found the matter indistinguishable from *Turner* and reversed a denial of defendant's motion for summary disposition. These cases indicate that, even in the face of specific allegations of negligence, an entity has no duty to protect the employee of a security company it hires from acts of third parties that the employee encounters in the course of his work.[2] Under *Turner* and *Carter*, defendant here has no duty to plaintiff that could give rise to a negligence action.

However, plaintiff here attempts to circumvent this line of authority by arguing that the assistant manager *assumed* a duty. He argues that even if defendant had no duty, in general, to protect him, the assistant manager assumed a duty when she volunteered to call the police and then breached that duty when she neither called the police nor informed plaintiff that she had not called them.[3]

There is Michigan authority recognizing a "volunteer theory." *Schanz v New Hampshire Ins Co*, 165 Mich App 395; 418 NW2d 478 (1988) involved an inaccurate appraisal of a building by an insurer. The *Schanz* Court held that the law does not impose a duty on insurers to inspect their insured's premises but found no error in the trial court's determination that defendant owed a duty to exercise reasonable care in appraising the property once it undertook this task. *Id*. at 401, 405. It cited, with approval, Restatement of Torts 2d, § 323, which states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking. [*Schanz, supra* at 402.]

See also *Sweet v Ringwelski*, 362 Mich 138; 106 NW2d 742(1961) (child pedestrian injured when driver stopped and indicated that she could cross in front of him but car in second lane hit her); *Lindsley v Burke*, 189 Mich App 700; 474 NW2d 158 (1991) (plaintiff injured when defendant gave a third party a hand signal indicating that the third party could make a left turn out of a driveway and the third party pulled into the path of plaintiff's car).

Here, plaintiff contends that the assistant manager undertook a duty to call the police and that defendant is liable for this assumption of duty through respondeat superior.[4] We do not believe that an individual should be able to *impose* a duty on a third party simply by asking the third party to do what any decent citizen would do, e.g., call the police when an altercation is imminent or underway. The present case is distinguishable on this basis from cases like *Shanz*, *Sweet*, and *Lindsley*, in which defendants voluntarily assumed duties on their own initiative, rather than merely responding to a request for assistance. Here, while the assistant manager's alleged agreement to call the police may have given rise to a moral duty to do so, it did not, in our judgment, constitute the voluntary undertaking of a legal duty that would implicate the volunteer theory. From a public policy vantage, extension of the volunteer theory to reach situations such as this might well deter people from responding to reasonable requests for emergency assistance if, by so doing, volunteers exposed themselves to the risk of being named as a party in a lawsuit. Further, the present case is also distinguishable on the basis that, here, plaintiff's injuries did not directly result from reliance on the assistant manager's actions as discussed below, whereas the injuries of the plaintiffs in the cited cases directly resulted from reliance on the defendants' actions.

Even if we assume that the assistant manager assumed a duty,[5] plaintiff must demonstrate that he relied on her representation that she would call the police and that such reliance caused his injuries. See Restatement of Torts 2d, § 323, *supra*. Plaintiff was not injured until after he re-encountered the

assistant manager when he escorted the evicted guest to the front desk. While he was not under a duty to do so, we note that, presumably, he could have ascertained at this point whether she had, in fact, telephoned the police, when she had done so and what the police said in response. Moreover, even if the assistant manager had telephoned the police, neither she nor defendant had any control over how quickly they would arrive. Plaintiff could determine for himself that the police were not present when the assistant manager instructed him to make sure that the evicted group left. Accordingly, plaintiff could assess for himself whether it was safe to leave the office and confront the group in the parking lot at that time. This independent ability to assess the situation made it unnecessary for plaintiff to rely on any representations by defendant's assistant manager. These intervening events break the proximate cause link between any duty defendant's assistant manager assumed and the injuries plaintiff suffered.[6] Accordingly, undisputed facts demonstrate that plaintiff would be unable to show that reliance on the assistant manager's agreement to call the police caused his injuries. Therefore, summary disposition for defendant was appropriate on this basis.

Alternatively, we note that the volunteer theory has been addressed in the similar context of a merchant's duty to provide security to patrons. In *Rhodes v United Jewish Charities of Detroit*, 184 Mich App 740; 459 NW2d 44 (1990), the plaintiff was assaulted in the defendant's fenced and guarded parking lot. The *Rhodes* Court reiterated that a landlord or merchant has no duty to provide police protection to deter the criminal acts of third parties, but held, "When a person voluntarily assumes the performance of a duty, that person is required to perform it carefully, not omitting to do what an ordinarily prudent person would do in accomplishing the task." *Id*. at 742-743. It accordingly reversed a summary disposition for the defendant. However, in *Scott v Harper Recreation, Inc*, 444 Mich 441; 506 NW2d 857 (1993) which also involved a patron injured in a parking lot advertised as secure, the Michigan Supreme Court reinstated a summary disposition for the defendant. The Court held at 452:

> The central holding of *Williams* [*v Cunningham Drug Stores*, 429 Mich 495; 418 NW2d 381 (1988)] is that merchants are ordinarily not responsible for the criminal acts of third persons. The present suit is an attempt to circumvent that holding by invoking the principle that a person can be held liable for improperly discharging a voluntarily undertaken function. However, the rule of *Williams* remains in force, even where a merchant voluntarily takes safety precautions. Suit may not be maintained on the theory that the safety measures are less effective than they could or should have been.

The Court also specifically limited *Rhodes*:

> To the extent that *Rhodes* implies that an agreement to provide security is an actionable warranty that the guarded area will be safe from all criminal activity, it is inconsistent with Michigan law.

Scott thus indicates that even when a merchant voluntarily assumes a duty to provide security, the merchant is not ordinarily liable for criminal acts of third parties that injure patrons.[7] See also *Abner v Oakland Mall Ltd*, 209 Mich App 490; 531 NW2d 726 (1995), which followed *Scott*. In both cases, summary disposition in the merchant's favor was found appropriate despite allegations that the

merchant voluntarily assumed a duty regarding security. A fortiori, a merchant is not ordinarily liable for the criminal acts of third parties that injure a security guard, whose very function is to protect patrons and premises from such activity, even where the merchant arguably assumed a duty relating to security through its agent.

Here, as in *Scott*, plaintiff is attempting to circumvent a general rule under which the defendant has no legal duty by asserting that the defendant voluntarily assumed a duty. As in *Scott*, the general rule remains in force, despite the assertion of an alleged voluntary assumption of a duty. The specific allegation that defendant's assistant manager acceded to plaintiff's request that she call the police is insufficient to overcome the core holding of *Turner* and *Carter* that an entity that hires a security guard company has no duty to protect the security guard from acts of third parties. Therefore, summary disposition for defendant was also appropriate on this basis.

For these reasons, we reverse the trial court's denial of defendant's motion for summary disposition.

/s/ Richard A. Bandstra
/s/ Stephen J. Markman

[1] The dissent cites cases that indicate that a business that knows or should know of a danger may have a duty to *patrons* to either summon the police or refrain from sending the patrons into a dangerous situation. *Jackson v White Castle Systems, Inc*, 205 Mich App 137; 517 NW2d 286 (1994); *Schneider v Nectarine Ballroom, Inc (On Remand)*, 204 Mich App 1; 514 NW2d 486 (1994). These cases do not indicate that a business has a similar duty with respect to security guards whom it hires to address these very situations.

[2] However, the *Turner* Court conceded, "There may be, and no doubt are, cases whose facts will give rise to a duty owed by someone employing a security guard company." *Turner*, *supra*, at 4.

[3] Plaintiff's complaint raised two additional arguments --that "in breach of its duties," defendant "unreasonably refused to provide a nominal refund" and "insisted that only unarmed white male guards be assigned to the premises"-- that do not merit consideration.

[4] Factual questions remain regarding whether the assistant manager's conduct would create any duty in defendant motel. Respondeat superior liability generally can be imposed only where the individual tortfeasor acted during the course of his or her employment and within the scope of his or her authority. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 624; 363 NW2d 641 (1984). Whether the assistant manger was acting within the scope of her authority in undertaking the responsibility of calling the police is a question of fact. See *Bajdek v Toren*, 382 Mich 151, 154; 169 NW2d 306 (1969). However, in view of our resolution of this case, we need not address this issue.

[5] We note that a factual dispute exists regarding whether the assistant manager was immediately relieved of any such duty; she testified that plaintiff called her back and told her "it was under control, to never

mind," but plaintiff denied this in his testimony. However, our resolution of this case makes it unnecessary to address this issue.

[6] Generally, proximate cause is a question of law while cause in fact is a question of fact. *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977).

[7] The *Scott* Court stated at 453, n 16, "We offer no view regarding other factual situations that might arise, such as where an important safety feature is specifically promised and is entirely absent, and injury is proximately caused thereby. However, we emphasize the core holding of *Williams*: Merchants are not responsible for maintaining public order or preventing crime."