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UNPUBLISHED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.

CAVANAGH, J. (dissenting).

I respectfully dissent. Because I believe that plaintiff has alleged factors indicating that the assistant manager of defendant Motel 6 voluntarily undertook a duty to summon the police, I would affirm the trial court's denial of defendant's motion for summary disposition.

Plaintiff was an unarmed security guard employed by defendant motel through Hawk Security. On the night in question, plaintiff was instructed by the assistant manager to evict some rambunctious guests. Plaintiff alleges that he used his walkie-talkie to ask the assistant manager to call the police. Plaintiff further alleges that the assistant manager responded that the police were on the way. The assistant manager contends that she did not call police because plaintiff canceled his request. Plaintiff accompanied one of the evicted guests to the office, and the latter unsuccessfully attempted to get a refund. When the angry guest left, the assistant-manager told plaintiff to follow him out to "make sure that they leave." Plaintiff did so, and the other guests surrounded and then beat him.

When we review a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(10), we consider evidence submitted by the parties in a light most favorable to the nonmoving party. *Tranker v Figgie Int'l, Inc*, 221 Mich App 7, 11; 561 NW2d 397 (1997). Accordingly, we must assume that plaintiff asked the assistant manager to call the police, the assistant manager told him that she was calling the police "right now," and plaintiff never withdrew the request.

The threshold question of whether a duty exists is a question of law for the court to decide. Only after finding that a duty exists may the factfinder determine whether, in light of the particular facts

of the case, there was a breach of the duty. *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997).

The majority correctly states that, as a general rule, an entity that hires a security guard has no duty to protect the security guard from the acts of third parties. See *Carter v Mercury Theater Co*, 146 Mich App 165, 167; 379 NW2d 409 (1985); *Turner v Northwest Gen'l Hosp*, 97 Mich App 1, 3-4; 293 NW2d 713 (1980). As the panel in *Turner* observed, "It would be ironic to hold [the defendant] liable to an employee of the very security guard company it hired for protection." *Id*. at 3-4. Nevertheless, the *Turner* Court did not conclude that this rule was without exceptions. The *Turner* panel stated, "There may be, and no doubt are, cases whose facts will give rise to a duty owed by someone employing a security guard company . . . ." *Id*. at 4.

Under the facts of this case, I conclude that the doctrine of assumption of risk elucidated in *Turner*, *supra*, and *Carter*, *supra*, is irrelevant. Similarly, *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988), holding that business owners have no duty to protect invitees from unanticipated criminal activity of third parties, is immaterial. Any duty in the instant case arose solely because of the assistant manager's voluntary assumption of the task of summoning the police.

In *Rhodes v United Jewish Charities of Detroit*, 184 Mich App 740, 743; 459 NW2d 44 (1990), this Court stated, "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." Or, as stated in the Restatement of Torts 2d, § 323, p 135:

> 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.

In the present case, 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 told plaintiff of her failure to act.

I find the majority's reliance on *Scott v Harper Recreation, Inc*, 444 Mich 441; 506 NW2d 857 (1993), to be inapposite.[1] In *Scott*, the Supreme Court reemphasized the core holding of *Williams v Cunningham Drug Stores*, 429 Mich 495; 418 NW2d 381 (1988), that is, that merchants are not responsible for maintaining public order or preventing crime. See *Scott*, *supra* at 453, n 16. However, this Court has found that, in situations where businesses knew or should have known about the presence of unruly persons on its premises, they have a duty to their patrons to either summon the police, see *Jackson v White Castle Systems, Inc*, 205 Mich App 137, 141-142; 517 NW2d 286 (1994); *Mills v White Castle Systems, Inc*, 167 Mich App 202, 208; 421 NW2d 631 (1988), or to refrain from sending their patrons into a situation known to be imminently dangerous, see *Schneider v Nectarine Ballroom, Inc (On Remand)*, 204 Mich App 1, 7; 514 NW2d 486 (1994).[2]

The majority claims that *Scott* "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." *Ante* at 4. However, the *Scott* Court stated: "We offer no view regarding other factual situations that might arise, such as where an important safety measure is specifically promised and is entirely absent, and injury is proximately caused thereby." *Scott*, *supra* at 453, n 16. Accordingly, the Supreme Court in *Scott* declined to offer an opinion on circumstances similar to those presented in the present case.

I also disagree with the majority's conclusion that intervening events broke the proximate cause link between any duty assumed by the assistant manager and plaintiff's injuries. Although the majority states that plaintiff was not under a duty to ascertain whether the assistant manager had followed through with her promise to call the police when he went to the office, the majority essentially imposes such a duty on him, without any citation to authority. In view of plaintiff's testimony that when he left the office, it was his understanding that the police were on the way, I disagree with the majority's conclusion that an intervening event broke the proximate cause link between the duty assumed by the assistant manager and plaintiff's injuries. It is possible that plaintiff would have declined to leave the safety of the office to make sure that the angry guests left the premises, had he known that the police were not coming because they had not been called.

Whether the police would have arrived in time to prevent any injury to plaintiff is a factual issue for the jury to decide. Likewise, proximate cause is usually a factual issue for the jury to determine. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 403; 571 NW2d 530 (1997). There may be more than one proximate cause of an injury, and a defendant cannot escape liability for its negligent conduct merely because the negligence of others may also have contributed to the harm caused. *Brisboy v Fibreboard Corp*, 429 Mich 540, 547; 418 NW2d 650 (1988); *Allen*, *supra* at 401-402. Reasonable persons could agree that the assistant manager's failure to summon the police was a proximate cause of plaintiff's injuries. Cf. *Mills*, *supra* at 209.

A remaining question is 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 manager was acting within the scope of her employment is a question of fact. *Bajdek v Toren*, 382 Mich 151, 154; 169 NW2d 306 (1969).

Because questions of fact exist, I would affirm the trial court's denial of defendant's motion for summary disposition.

/s/ Mark J. Cavanagh

[1] *Scott* involved a general risk of crime in the community, rather than a specific, known risk, as in the instant case. In *Scott*, the defendant nightclub advertised with written fliers that stated that it provided "Free Ample Lighted Security Parking." The plaintiff, a patron of the nightclub, was shot multiple times

by an unknown gunman in the parking lot. *Scott*, *supra* at 442-443. The Supreme Court rejected the plaintiff's claim that the defendant had voluntarily undertaken a duty to keep its patrons safe, stating that neither the defendant's advertisements nor the security measures it put into place constitute a guarantee of the plaintiff's personal safety. *Id*. at 450-451.

[2] The majority notes that *Jackson*, *Mills*, and *Schneider* all deal with a business's duty to *patrons*, rather than security guards. However, I merely cite these cases in response to the majority's reliance on *Scott*, which is also a case involving a business's duty to patrons.