STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA BEAN, guardian and conservator for HEATHER BEAN,

Plaintiff-Appellant,

v

DIRECTIONS UNLIMITED, INC.,

Defendant-Appellee.

UNPUBLISHED
November 20, 1998

No. 205482
Houghton Circuit Court
LC No. 96-009674 NO

Before: Saad, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Plaintiff Patricia Bean, as guardian and conservator for Heather Bean, a developmentally disabled person, appeals as of right from a judgment of no cause of action in favor of defendant. This judgment followed a jury's determination that defendant was negligent in its hiring and supervision of Gerald Flagle, who had sexual relations with Heather, another employee, but that the negligent hiring and supervision was not a proximate cause of any injury to Heather. Moreover, the jury determined that although Flagle willfully and intentionally touched Heather without her consent, the touching was not accomplished through the exercise of authority given to Flagle by defendant. The jury also found that Heather sustained no damages. On appeal, plaintiff challenges the denial of her motion for a new trial on grounds that the verdict was against the great weight of the evidence. In the alternative, she challenges the trial court's denial of additur. We reverse and remand for a new trial.

Plaintiff argues that the trial court abused its discretion when it denied her motion for a new trial. She maintains that the jury's finding, that the negligent hiring and supervision of Flagle was not a proximate cause of plaintiff's damages, was against the great weight of the evidence.

> The trial court's function on a motion for a new trial is to determine whether the overwhelming weight of the evidence favors the losing party. Our function as an appellate court is to determine whether the trial court abused its discretion in making

such a finding. *Arrington v Detroit Osteopathic Hospital Corp (On Remand)*, 196 Mich App 544, 564; 493 NW2d 492 (1992).

The elements necessary to establish a prima facie case of negligence are duty; breach of that duty; causation, including both cause in fact and proximate cause; and damages. *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993); *Eichhorn v Lamphere School Dist*, 166 Mich App 527, 545; 421 NW2d 230 (1988). Here, the jury found that defendant was negligent in its hiring and supervision of Flagle. The element presently at issue is whether this negligent hiring and supervision was a proximate cause of plaintiff's damages.

Proximate cause is proven when a natural and continuous sequence, unbroken by new and independent causes, produces the injury. *McMillan v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). It involves a determination that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable. *Adas v Ames Color-File*, 160 Mich App 297, 301; 407 NW2d 646 (1987). Proximate cause depends in part on whether injury would be "foreseeable" to a reasonable and prudent person. *Etter v Michigan Bell Telephone Co*, 179 Mich App 551, 556; 446 NW2d 500 (1989); *Babula v Robertson*, 212 Mich App 45, 53; 536 NW2d 834 (1995). Proximate cause is usually a factual issue to be decided by the jury. *Schutte v Celotex Corp*, 196 Mich App 135, 138; 492 NW2d 773 (1992).

An intervening cause, one which actively operates to produce the harm after the negligence of the defendant, can relieve a defendant from liability. *Poe v Detroit*, 179 Mich App 564, 577; 446 NW2d 523 (1989). An intervening cause is not a superseding cause if it was reasonably foreseeable. *Hickey v Zezulka*, 439 Mich 408, 437; 487 NW2d 106 (Brickley, J.), 447 (Riley, J.) (1992); *McMillan v Vliet*, *supra* at 576. When there are no policy considerations involved, whether an intervening cause is also a superseding cause which relieves the defendant of liability is a question for the jury. *Arbelius v Poletti*, 188 Mich App 14, 21; 469 NW2d 436 (1991).

Here, the jury found that James Koivu negligently hired and supervised Flagle. The evidence showed that Koivu had knowledge of Flagle's prior criminal sexual conduct with a mentally retarded person and that he discovered Heather and Flagle behind closed doors before opening hours. Given this knowledge, Koivu should have foreseen that Heather was at great risk of sexual abuse by Flagle. Accordingly, the abuse flowed from one natural and continuous sequence unbroken by new and independent causes. *McMillan v Vliet*, *supra* at 576. The overwhelming weight of the evidence suggests that it was Flagle's status as an employee, and his possession of keys to the facility, that created the opportunity for him to engage in sexual activity with Heather. Moreover, the evidence demonstrated that defendant knew Flagle assumed more authority than he actually had, and had to be reminded of the limits of his job. Defendant should have known that this exercise of authority may have made Heather more vulnerable. Considering the evidence, we conclude that the trial court erred in denying a new trial because the weight indicates that defendant should not have been relieved of liability on grounds that there was an intervening cause that actively operated to produce the harm after the negligence of defendant. *Poe*, *supra* at 577. Since we are unable to find competent evidence to support the jury's verdict, *Carden v General Motors Corp*, 156 Mich App 202, 209; 401 NW2d

273 (1986), we conclude that the trial court abused its discretion in denying plaintiff's motion for a new trial.

Plaintiff also argues that the jury's finding, that Flagle's touching of Heather was not accomplished through the exercise of authority given to Flagle by defendant, was against the great weight of the evidence. The essence of the doctrine of respondeat superior has been explained by the Court as follows:

> Under the doctrine of *respondeat superior* there is no liability on the part of an employer for torts intentionally or recklessly committed by an employee beyond the scope of his master's business. *Martin v Jones*, 302 Mich 355, 358 [4 NW2d 686 (1942)]. [*Bradley v Stevens*, 329 Mich 556, 562; 46 NW2d 382 (1951).]

Plaintiff argues that the principle in *Champion v Nation Wide Security*, 450 Mich 702, 712; 545 NW2d 596 (1996) -- that an employer need not authorize its supervisor to commit rape in order to be held liable in the event that a supervisor does so -- applies to the instant case. However, unlike *Champion* the evidence in the instant case did not show that Flagle was Heather's supervisor or that he made sexual demands a condition of her employment. Since Flagle was not Heather's supervisor in the context of her employment, defendant could not be held liable based on this theory. Coextensively, the trial court did not err in refusing to give plaintiff's proposed jury instruction that "an employer is strictly liable where its supervisor accomplishes sexual abuse through the exercise of his supervisory power over the victim."

Under the doctrine of respondeat superior, defendant would not be liable for torts intentionally committed by Flagle if they were beyond the scope of his master's business. *Bradley, supra* at 562. Although Flagle's sexual acts with Heather occurred on defendant's premises, the incidents occurred before operating hours. Defendant created no necessity for Flagle to be in the building before hours, and derived no benefit from his presence. Flagle's presence at the drop-in center was never condoned and was finally the reason for his discharge. Based on the evidence, the jury's finding that Flagle's touching of Heather was not accomplished through the exercise of authority given to Flagle by defendant was not against the great weight of the evidence, and the trial court did not abuse its discretion in denying plaintiff's motion for a new trial on this ground.

Plaintiff finally argues that the finding by the jury that Heather sustained no damages as a result of being raped ten times by Flagle is shocking and outrageous. Since we have decided that a new trial should be granted, the issue of damages will necessarily have to be decided. Therefore, we need not address the issue of additur.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Roman S. Gribbs