# STATE OF MICHIGAN

# COURT OF APPEALS

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CYNTHIA HALL, as Personal Representative of the Estate of JAMES LEE HALL, deceased,

Plaintiff-Appellant,

v

SIMON DOE d/b/a THE WORLDWIDE BOOKSTORE,

Defendant-Appellee.

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UNPUBLISHED
April 27, 1999

No. 204394
Wayne Circuit Court
LC No. 97-713850 NO

Before: Hood, P.J., and Holbrook, Jr. and Whitbeck, JJ.

PER CURIAM.

Summary disposition was granted to defendant pursuant to MCR 2.116(C)(8). Plaintiff appeals as of right, and we affirm.

Plaintiff alleged that the decedent, James Hall, worked for defendant in Highland Park, Michigan as a cashier for thirteen years prior to his death. The cashier area was open and accessible to defendant's patrons. Hall's hours of employment were 3:30 p.m. until 9:45 p.m. Defendant employed a security guard from 12:00 p.m. until 7:00 p.m. only. On July 21, 1994, Hall was shot and killed during a robbery at the adult bookstore. Plaintiff further alleged that because defendant had undertaken to provide security, he had a duty to provide security in a non-negligent manner, and that the duty was breached by the failure to provide security after 7:00 p.m. Plaintiff also alleged that defendant, as decedent's employer, had an obligation to maintain reasonably safe and healthful working conditions, and that the duty was breached by maintaining an open and accessible cashier department and failing to provide security after 7:00 p.m.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8), arguing that the exclusive remedy of the Michigan Worker's Disability Compensation Act (WCDA), MCL 418.131; MSA 17.237(131), barred recovery; that plaintiff failed to plead facts in avoidance of the exclusive remedy provision; and that, even if the exclusive remedy provision did not apply, he did not owe any duty to plaintiff to make the premises safe from the criminal acts of third parties. Plaintiff argued that she was entitled to bring her action where defendant failed to provide workers' compensation insurance and

further, that defendant did owe decedent a duty because the shooting was foreseeable. After hearing argument from the parties, the trial court granted summary disposition, finding that the cases of *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988) and *Scott v Harper Recreation, Inc*, 444 Mich 441; 506 NW2d 857 (1993) mandated the grant of summary disposition.

A trial court's grant of summary disposition is reviewed de novo on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion under MCR 2.116(C)(8), the test is whether, based on the pleadings alone, the plaintiff has stated a claim on which relief may be granted. *Id.* The motion has to be granted if no factual development could justify the plaintiff's claim for relief. *Id.*

It is entirely unclear from the record whether defendant had workers' compensation insurance applicable to this case, and we note that the trial court failed to make a determination as to whether plaintiff's suit was barred by the exclusive remedy provision of the WDCA[1]. Although we cannot, based on the record before us, determine whether defendant needed to have workers' compensation insurance, or whether he, in fact, did have such insurance, we can resolve the issues in this case.

First, we agree with defendant that if there was workers' compensation insurance, plaintiff's suit needed to be dismissed because of the exclusive remedy provision, MCL 418.131; MSA 17.237(131). There is only one exception to the exclusive remedy provision:

> The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. [MCL 418.131(1); MSA 17.237(131).]

"[T]o state a claim against an employer for an intentional tort, the employer must deliberately act or fail to act with the purpose of inflicting an injury upon the employee." *Travis v Dreis & Krump Mfg Co.*, 453 Mich 149, 172; 551 NW2d 132 (1996) (Boyle, J.). Plaintiff's complaint completely fails to allege that defendant acted or failed to act *with the purpose of inflicting an injury* on decedent. Therefore, if there was workers' compensation insurance, the exclusive remedy provision would bar plaintiff's suit because plaintiff failed to plead facts sufficient to avoid that provision.

If there was no worker's compensation insurance, we agree with plaintiff that the exclusive remedy provision does not apply to bar her suit. If an employer is required to provide workers' compensation insurance and fails to do so, his employee may file a civil action notwithstanding the exclusive remedy provision. MCL 418.641(2); MSA 17.237(641)(2). Similarly, if an employer is not required to and does not provide worker's compensation insurance because he does not regularly employ three or more employees, he may not rely on the exclusive remedy provision to bar a suit by an employee. *Pallarito v Vore*, 164 Mich App 650, 653-654; 417 NW2d 567 (1987). Even though we agree that if there was no worker's compensation insurance in this case, plaintiff's suit is not barred by

the exclusive remedy provision, we nevertheless find that plaintiff's suit was properly dismissed. Plaintiff failed to state a claim on which relief can be granted.

Generally, there is no duty for one person to assist, help or protect another person endangered by a third person's conduct. *Mason v Royal Dequindre, Inc*, 455 Mich 391, 397; 566 NW2d 199 (1997); *Williams, supra* at 498-499. However, there is an exception to this rule when there exists a special relationship between the parties. *Mason, supra* at 397. Special relationships exist between common carriers and passengers, innkeepers and guests, employers and employees, and landowners and invitees. *Williams, supra* at 499. See also *Marcelletti v Bathani*, 198 Mich App 655, 664; 500 NW2d 124 (1993).

> The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety. [*Williams, supra*.]

In the case of the common carrier and passenger, the carrier is under a duty to its passenger to protect against unreasonable risk of physical harm. *Mason, supra* at 397, n 2, citing Section 314A of 2 Restatement Torts, 2d, p 118. Innkeepers have a similar duty to their guests; possessors of land have a similar duty to their invitees; and those who voluntarily take custody of others so as to deprive them of the normal opportunity of protection have a similar duty to the those over whom they have taken custody. *Id.* at 397-398, n 2. By analogy, employers have a similar duty to their employees where their employees have entrusted themselves to their employer, who is in control and is best able to provide a place of safety.

The concept of special-relationship duties has best been developed in the context of merchants and invitees. In *Williams, supra* at 500, the Court indicated that the duty of a possessor of land "does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious and apparent that an invitee may be expected to discover them himself." The Court held that a merchant's duty of reasonable care does not include providing armed and visible security guards to deter criminal acts by third parties. *Id.* at 501-502. In *Scott, supra* at 450-452, the Court reiterated the holding in *Williams*, and further ruled that where a merchant voluntarily undertakes safety precautions, such as hiring a security guard, this action does not give rise to a duty to protect against third parties where none existed before. The merchant may not be held liable on the theory that safety measures were "less effective than they could or should have been." *Id.* at 452. Recently, in *Mason, supra* at 393, the Court clarified that in order for a merchant to be liable in tort for failing to take reasonable measures to protect an invitee from harm caused by the criminal act of a third party, the harm "must be foreseeable to an identifiable invitee and preventable by the exercise of reasonable care." In other words, "in order for a special-realtionship duty to be imposed on a defendant, the invitee must be "readily identifiable as [being] foreseeably endangered." *Id.* at 398.

In *Mason, supra* and its companion case, *Goodman v Fortner*, the Court examined the evidence to determine if the defendants had a duty to take reasonable measures to protect the injured

plaintiffs. In *Mason*, the Court found that no duty existed because there was no evidence that the defendant knew that the plaintiff was in danger, and thus there was no evidence to support a finding that the attack on the plaintiff was foreseeable to the defendant. In *Goodman*, however, the Court found that the defendant knew or should have known that the plaintiff was in danger. Moreover, the Court found that the harm to the plaintiff was foreseeable:

> [T]wo previous shootings had occurred in the defendant bar's parking lot not long before Goodman's shooting. One may have occurred in the same month as the Goodman shooting. Moreover, at least one resulted from an argument between bar patrons inside the bar. Consequently, defendant was on notice that the harm that occurred was foreseeable, plaintiff having been an identifiable invitee of defendant's establishment. [*Id.* at 404-405.]

If we assume that a duty between an employer and employee exists similar to that between a merchant and invitee because they are both special relationships, we are compelled to affirm the trial court's grant of summary disposition. Plaintiff has not pleaded sufficient facts to state a cause of action. Specifically, plaintiff has failed to plead that there were any foreseeable dangers to decedent; that decedent's death was foreseeable; that decedent's death was imminent; or that there was an unreasonable risk of harm, which could have been prevented by the exercise of reasonable care. Plaintiff did not allege any fact from which it could be inferred that defendant had any reason whatsoever to believe that there was foreseeable danger to Hall. Plaintiff's allegation that because defendant voluntarily undertook to provide security, he had a duty to fulfill that responsibility in a non-negligent manner, clearly fails to state a cause of action. *Scott, supra*. Similarly, plaintiff's allegation that the employer breached the duty to provide safe and healthful employment conditions where the cashier cage was open and accessible fails because of the lack of allegations concerning foreseeable dangers.

Accordingly, the trial court did not err in granting summary disposition to defendant where there were no facts pleaded which would give rise to a duty on the part of defendant to protect plaintiff's decedent from criminal acts by a third party.

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ William C. Whitbeck

[1] At oral argument in the trial court, defendant argued that his business was required to have workers' compensation insurance, and that it had such insurance. Apparently defendant and the insurer were engaged in a dispute over whether sufficient funds to cover the premium had been paid. Plaintiff argued, on the other hand, that there was no insurance covering decedent on the date of his death, and that because defendant did not have more than three employees, he was not required to have it. Therefore, plaintiff argued that the exclusive remedy provision did not apply to bar her suit.