STATE OF MICHIGAN

COURT OF APPEALS

SEAN McBRIDE,

Plaintiff-Appellee/Cross-Appellant,

v

PINKERTON'S, INC., d/b/a PINKERTON SECURITY & INVESTIGATION SERVICES,

Defendant-Cross-Plaintiff-Appellant/Cross-Appellee,

and

PM ONE, LTD., d/b/a PM DIVERSIFIED,

Defendant-Cross-defendant-Appellee/Cross-Appellee,

and

METROPOLITAN REALTY CORP,

Defendant-Appellee/Cross-Appellee.

UNPUBLISHED
July 2, 1999

No. 202204
Wayne Circuit Court
LC No. 94-422938-NO

SEAN McBRIDE,

Plaintiff-Appellee,

v

PINKERTON'S, INC., d/b/a PINKERTON SECURITY & INVESTIGATION SERVICES,

Defendant-Cross-Plaintiff-Appellee,

No. 202147
Wayne Circuit Court
LC No. 94-422938-NO

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and

PM ONE, LTD., d/b/a PM DIVERSIFIED,

Defendant-Cross-Defendant-
Appellant,

and

METROPOLITAN REALTY CORP,

Defendant.

Before: Young, Jr., P.J., and Murphy and Hoekstra, JJ.

HOEKSTRA, J. (dissenting).

I respectfully dissent from section I of the lead opinion, which affirms the trial court's denial of the motion for a judgment notwithstanding the verdict by Pinkerton Security and Investigation Services ("Pinkerton"); and section VII, which reverses the trial court's grant of summary disposition to defendant PM One Ltd. ("PM") and Metropolitan Realty Corporation ("Metro").[1] I would hold that plaintiff proffered no basis upon which to conclude that Pinkerton owed him a duty of care. Accordingly, I would reverse the order of the lower court denying Pinkerton's motion for a judgment notwithstanding the verdict, affirm the trial court's order granting PM and Metro summary disposition, and find that the remaining issues are rendered moot.

My first and primary basis for dissenting is that I believe the foreseeability factor of the duty analysis required in this case is of more consequence than either the lead opinion or the concurring opinion acknowledges. It is well established that where there is no legal duty there can be no actionable negligence. *Blackwell v Citizens Ins Co,* 457 Mich 662, 667; 579 NW2d 889 (1998). Duty is the threshold element of any negligence action. *Id.* Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. *Moning v Alfono,* 400 Mich 425, 439; 254 NW2d 759 (1977).

"In determining whether a duty exists, courts examine a wide variety of factors, including the relationship between the parties and the *foreseeability* and nature of the risk." *Schultz v Consumers Power Co,* 443 Mich 445, 450; 506 NW2d 175 (1993) (emphasis added). See also *Mason v Royal Dequindre, Inc,* 455 Mich 391; 566 NW2d 199 (1997). Foreseeability depends upon whether a reasonable person could anticipate that a given event might occur under certain conditions. *Schultz,*

supra at 452, quoting *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 406; 224 NW2d 843 (1975).

The questions of duty and proximate cause are interrelated because both depend in part on foreseeability – whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable. *Moning, supra*. Rather than going to the jury on the issues of breach of duty, proximate cause, and damages, this case should have been resolved in defendants' favor on the threshold question of duty because no reasonable person could have anticipated that this event might occur under these conditions.

Plaintiff argues that the two to four verbal exchanges inside the lobby did not render the crime so random and instantaneous that Pinkerton's employee lacked notice to exercise reasonable care for the protection of the tenant, plaintiff. Moreover, plaintiff argues that Pinkerton had notice in the form of earlier complaints by tenants about loitering outside the building and failure to enforce the intercom system.

However, in my opinion, neither the assailants, Pinkerton's employee, nor Pinkerton could have known that these parties would come together in this place and time. Rather, this was a chance encounter that was unconnected to the events that preceded it in the lobby. Where the shooting occurred as one party was coming and others were leaving, the shooting constituted no more than an unfortunate, random act of violence for which Pinkerton should not be held legally responsible for failing to anticipate or prevent. Indeed, it was just as probable that this incident could have occurred had defendant's agent fulfilled her duties and directed the assailants to leave the premises at the precise time plaintiff was returning from his errand.

Additionally, I believe that this case should have been fully resolved in defendants' favor on the question of duty because the level of protection plaintiff sought to obtain was broader than the agreed-upon contractual obligations. Absent a specific promise to do so, a security contract does not ensure the personal safety of another. "A promise to take specific steps to reduce danger is a promise to do just that – not a promise to eliminate the danger." *Scott v Harper Recreation, Inc,* 444 Mich 441, 450; 506 NW2d 857 (1993).

To prevent the assault in this case would have required Pinkerton to provide a level of protection well beyond the scope of protection that Pinkerton contractually agreed to render for plaintiff's landlord. Within a contractually limited scope of risk, Pinkerton undertook to render only limited security services, including monitoring access to the common area, signing in guests, and observing the common area for reportable activities. These services cannot rationally be interpreted to include the level of protection required to prevent the random attack in this case. Indeed, to equate Pinkerton's obligations to that level of protection would be tantamount to holding that Pinkerton assumed the duty to guarantee plaintiff's safety at all times and in all places on the premises and grounds. Pinkerton's undertaking simply did not extend this far, and neither plaintiff's reliance upon

Pinkerton nor Pinkerton's alleged failure to fulfill even those tasks it did assume can broaden the scope of Pinkerton's undertaking.

/s/ Joel P. Hoekstra

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[1] In light of my resolution of this issue in favor of PM, I have accepted the lower court's finding that PM was plaintiff's landlord, despite PM's argument that certain receivership proceedings precluded this finding. Like the lower court, I have nonetheless chosen to treat PM and Metro as one as plaintiff represents that they were represented by the same counsel and proffered the same legal arguments and motions.