STATE OF MICHIGAN

COURT OF APPEALS

JOHN DOE, Next Friend of JANE DOE, a minor,

Plaintiff-Appellee,

v

JOHN DOE I, HENRY FORD HOSPITAL and HENRY FORD HEALTH SYSTEM, INC.,

Defendants,

and

JOHN DOE II and SUPERIOR AMBULANCE SERVICE,

Defendants-Appellants.[1]

UNPUBLISHED
September 17, 2009

No. 285655
Wayne Circuit Court
LC No. 07-701308-NO

Before: O'Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

Defendants, John Doe II (O'Connell) and Superior Ambulance Services (Superior), appeal by leave granted the trial court's denial of their late motion to file a notice of nonparty at fault and partial denial of their motion for summary disposition. We affirm in part and reverse in part.

I. Factual and Procedural History

The facts are undisputed. Matt DeFillippo (John Doe I), an employee of defendant Superior Ambulance, sexually assaulted plaintiff's 14-year-old daughter, Jane Doe, in the back of an ambulance while she was being transported from Henry Ford Hospital to Harbor Oaks Hospital.

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[1] We note that defendants John Doe I and John Doe II were emergency medical technicians employed by defendant Superior Ambulance Service and their identities are known. John Doe I is Matt DeFillippo and John Doe II is identified as Timothy O'Connell.

On July 25, 2006, plaintiff took Jane Doe to Henry Ford Hospital because she had attempted suicide. Jane Doe then was transferred to a psychiatric hospital located approximately 60 miles away. Henry Ford personnel summoned an ambulance to effectuate the transport. O'Connell (John Doe II) drove the ambulance, while DeFillippo (John Doe I) rode in the back with Jane Doe. Jane Doe, dressed in a hospital gown, was in a five-point psychiatric belt that she could not unhook. The ambulance was locked from the inside.

The drive took 53 minutes, with the ambulance leading the way and plaintiff following in his vehicle. During that time, O'Connell became suspicious that DeFillippo was sexually assaulting Jane Doe because DeFillippo had turned off the ambulance's interior lights and was in very close physical proximity to Jane Doe for an extended time period. O'Connell could see that DeFillippo's left arm was draped near Jane Doe's hips, but could not see into the back of the ambulance because the lights were off and the patient was facing backwards.

O'Connell sent a text message regarding DeFillippo's suspicious behavior to his former partner, who did not immediately respond. O'Connell then sent another text message to his partner, who advised him to contact his supervisor regarding his suspicions. O'Connell sent a text message to his supervisor, Jamie Jose, who advised him to get DeFillippo out of the back of the ambulance and to turn on the lights. Despite O'Connell's request, DeFillippo did not immediately come to the front of the ambulance to sit in the jump seat. When they arrived at the hospital, DeFillippo did not immediately open the ambulance doors, but was observed speaking to Jane Doe. O'Connell saw that Jane Doe's gown was not completely fastened in the back. O'Connell noted that Jane Doe's demeanor had changed indicating she appeared more introverted and did not make eye contact when they arrived at their destination.

As a result of O'Connell's suspicions, the Michigan State Police interviewed Jane Doe. Jane Doe stated that DeFillippo had appeared compassionate and stroked her shoulder underneath her hospital gown. He asked her if he could feel her breasts; she indicated that she did not care, so he felt her left breast underneath her gown. Jane Doe said that she was frightened and just let him touch her. DeFillippo then kissed her breast and mouth and digitally penetrated her vagina. DeFillippo told Jane Doe not to tell anyone because he could get fired and her father would be very upset. He gave her his telephone number and indicated that the next time they met, she should bring her girlfriend along. DeFillippo pleaded guilty to third-degree criminal sexual conduct and was incarcerated at the time this litigation was initiated.

Plaintiff filed suit against defendants in January of 2007, but did not serve DeFillippo, who remained in prison. Defendants filed a motion to dismiss DeFillippo from the action and for permission to file a late notice naming DeFillippo as a nonparty at fault. At the hearing, plaintiff's counsel admitted that DeFillippo was not served during the life of the summons. The court denied the motion as untimely filed. The trial court subsequently entered an order dismissing DeFillippo from the litigation.

Defendants also filed a motion seeking summary disposition. The trial court granted summary disposition in favor of defendants regarding plaintiff's claims based on the vicarious liability of Superior for DeFillippo's criminal actions and for John Doe's claim of intentional infliction of emotional distress. The trial court denied summary disposition regarding the remainder of plaintiff's claims. Defendants Superior and O'Connell filed an application for leave to appeal, which was granted by this Court. *Doe v Doe I,* unpublished order of the Court of Appeals, entered October 23, 2008 (Docket No. 285655).

II. Standard of Review

This Court reviews issues pertaining to the construction and interpretation of court rules under a de novo standard. *Haliw v City of Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005). We also review a trial court's decision regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

III. Analysis

A. Nonparty at Fault

Defendants contend the trial court erred in ruling they waited too long to name DeFillippo as a nonparty at fault. We agree.

In accordance with Michigan's 1995 tort reform legislation, the state has adopted a "fair share liability" system, where each tortfeasor is responsible, according to his or her percentage of fault, for a portion of the total damages. See *Smiley v Corrigan*, 248 Mich App 51, 55; 638 NW2d 151 (2001). MCL 600.2957(1) provides that the trier of fact shall allocate the liability of each person "regardless of whether the person is, or could have been, named as a party to the action." A finding of fault does not subject a nonparty to liability in the action, but is used only to determine the fault of named parties. MCL 600.2957(3). Thus, in a tort action such as this one, fault must be allocated to each person who is at fault, regardless of whether that person is or could be a party to the action. MCL 600.2957; MCL 600.6304.

The court rule that requires a party to timely file a notice of nonparty fault, MCR 2.112(K), provides, in relevant part:

> The notice must be filed within 91 days after the party files its first responsive pleading. On motion, the court shall allow a later filing of the notice on a showing that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier, provided that the late filing of the notice does not result in unfair prejudice to the opposing party. [MCR 2.112(K)(3)(c).]

The function of the court rule was discussed in this Court's ruling in *Veltman v Detroit Edison Co*, 261 Mich App 685, 695; 683 NW2d 707 (2004). Specifically:

> MCR 2.112(K) concerns the procedural implementation of the elimination of joint liability, the reapplication of several liability, and the allocation of fault to a nonparty as provided in MCL 600.2957 and MCL 600.6304. The purposes of the court rule are to provide notice that liability will be apportioned, provide notice of nonparties subject to allocated liability, and allow an amendment to add parties, thereby promoting judicial efficiency by having all liability issues decided in a single proceeding.

In addition, 1 Longhofer, *Michigan Court Rules Practice* (5th ed), § 2112.13, p 312, explains the purpose behind MCR 2.112(K) as follows:

> Subrule (K) is designed to protect the parties from undue surprise and unfair tactics. The notice requirements prevent a party from changing the entire focus of the litigation by introducing the alleged fault of a nonparty at a late stage in the litigation.

Plaintiff named John Doe II, whom the parties understood to be DeFillippo, as a defendant. However, plaintiff never served DeFillippo. If defendants had been reasonably diligent, they could have ascertained that DeFillippo was not served and, thus, not a party to the suit. As a result, defendants could have filed a timely notice of nonparty at fault. However, defendants contend that they had no reason to undertake such reasonable diligence, where plaintiff was aware of DeFillippo's identity and whereabouts, had named him as a party and made specific allegations against him in the complaint.

The purposes of Subrule K are not effectuated if defendants are precluded from filing a notice of nonparty at fault. Subrule (K) is designed to protect from undue surprise. In this case, plaintiff was fully aware of DeFillippo's identity. The notice requirements are intended to prevent a party from changing the entire focus of the litigation by untimely introduction of the alleged fault of a nonparty. In this situation, the main focus of the litigation remains DeFillippo's actions and the resulting fault.

Plaintiff argued in the trial court that he would be prejudiced by the addition of DeFillippo as a nonparty because DeFillippo would then have the right to re-depose numerous witnesses. However, plaintiff assumed this risk by failing to serve DeFillippo. In addition, plaintiff has failed to demonstrate a reasonable likelihood that any witnesses will actually be re-deposed, given DeFillippo's current status as a prison inmate and his presumed indigency.

While the facts in *Rodriguez v ASE Industries*, 275 Mich App 8; 738 NW2d 238 (2007) are not aligned with those in the instant case, we find its reasoning regarding the relationship between plaintiffs and nonparties at fault to be applicable. Specifically:

> A plaintiff certainly has strategic reasons not to afford the jury an opportunity to allocate fault to a particular nonparty. Any fault that the jury might allocate to a nonparty may be a portion of fault that the jury then does not allocate to an actual defendant, which then reduces the amount the plaintiff can recover from an actual defendant.
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> But we do not believe that plaintiff can create an appellate parachute for herself by omitting [defendant] from the allocation of fault because [he] had been dismissed, thus potentially increasing the amount of fault allocated to the remaining defendant . . . . [*Id.* at 21-22.]

Plaintiff's failure to include DeFillippo as a party likely will increase the amount of fault allocated to the remaining defendants, despite DeFillippo's unquestionable status as the principal tortfeasor. Plaintiff elected not to serve DeFillippo and never dismissed him from the lawsuit. Under these factual circumstances, the trial court erred in denying defendants' motion.

B. Summary Disposition

Superior and O'Connell contend the trial court erred in denying their motion for summary disposition regarding plaintiff's claims asserting the existence of common law and statutory duties to protect and in failing to recognize the availability of immunity pursuant to the Emergency Medical Services Act (EMS Act), MCL 333.20965(1).

"'The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature.'" *Taylor v Currie*, 277 Mich App 85, 94; 743 NW2d 571 (2007) (citation omitted). "The first criterion in determining legislative intent is the specific language of the statute . . . . If the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor permitted . . . ." *Id.*

The EMS Act, MCL 333.20965(1), provides, in relevant part:

> Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a medical first responder, emergency medical technician . . . that are consistent with the individual's licensure or additional training required by the medical control authority including, but not limited to, services described in subsection (2), or consistent with an approved procedure for that particular education program do not impose liability in the treatment of a patient on those individuals or any of the following persons . . . .

It is undisputed that Jane Doe was a "nonemergency patient," which is defined by MCL 333.20908(1) as:

> an individual who is transported by stretcher, isolette, cot, or litter but whose physical or mental condition is such that the individual may reasonably be suspected of not being in imminent danger of loss of life or of significant health impairment.

The gross negligence or willful misconduct standard of MCL 333.20965(1) applies only to the "acts or omissions" of an "emergency medical technician . . . in the *treatment* of a patient." (Emphasis added.) Because the statute does not define the term "treatment," we may look to the ordinary dictionary definition. In accordance with *Random House Webster's College Dictionary* (1997), treatment is defined as "the application of medicines, surgery, therapy, etc., in treating a disease or disorder." It is undisputed that the services being provided by defendants in this matter concerned merely the provision of transport and not medical treatment. As such, and in accordance with the plain statutory language, MCL 333.20965(1) is inapplicable to the circumstances of this case. Because we find that MCL 333.20965(1) is not applicable, we need not address defendants' additional assertions regarding the broader application of the statute.

In their complaint, plaintiffs claimed that O'Connell, and Superior as O'Connell's employer, breached both a statutory and a common law duty to protect Jane Doe. Superior and O'Connell contend that the trial court erred in denying their motion for summary disposition because O'Connell had no duty to protect Jane Doe from DeFillippo's criminal act and cannot be held liable for allowing the assault to continue.

Pursuant to the child protection law, MCL 722.623 provides, in relevant part:

> (1) An individual is required to report under this act as follows:
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> (a) A physician, dentist, physician's assistant, registered dental hygienist, medical examiner, nurse, *person licensed to provide emergency medical care*, audiologist, psychologist, marriage and family therapist, licensed professional counselor, social worker, licensed master's social worker, licensed bachelor's social worker . . . school administrator, school counselor or teacher, law enforcement officer, member of the clergy, or regulated child care provider *who has reasonable cause to suspect child abuse or neglect shall make immediately, by telephone or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the department*. Within 72 hours after making the oral report, the reporting person shall file a written report as required in this act. If the reporting person is a member of the staff of a hospital, agency, or school, the reporting person shall notify the person in charge of the hospital, agency, or school of his or her finding and that the report has been made, and shall make a copy of the written report available to the person in charge. [Emphasis added.]

The term "child abuse" is defined in MCL 722.622(f) as "harm or threatened harm to a child's health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal guardian, or any other person responsible for the child's health or welfare . . . ." The term "immediately" is defined by *Random House Webster's College Dictionary* (1997) as "without lapse of time; at once."

Because O'Connell was licensed to provide emergency medical care, MCL 722.623(1)(a) is applicable. The trial court did not err in denying summary disposition because a genuine issue of material fact existed regarding whether O'Connell breached his statutory reporting duty.

At common law, a person generally has no duty to aid or protect someone else from a third person's conduct. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988); *Marcelletti v Bathani*, 198 Mich App 655, 664; 500 NW2d 124 (1993). However, a duty may arise if there is a special relationship between the defendant and the victim or the person causing the injury. *Marcelletti, supra* at 664. Defendants do not challenge the trial court's determination regarding the existence of a special relationship in asserting that O'Connell acted reasonably and, therefore, cannot be held liable. However, this comprises a factual issue for a jury to determine. Because a genuine issue of material fact exists regarding whether O'Connell was negligent in failing to protect Jane Doe there is also a genuine issue of material fact regarding whether Superior could be liable for O'Connell's conduct as his employer under the respondeat superior theory. *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996). As a result, the trial court did not err in denying defendants' request for summary disposition on this claim.

Superior and O'Connell also maintain that the trial court erred when it denied their motion to dismiss plaintiff's negligent hiring and training allegations against Superior. On appeal, the parties fail to address this claim specifically with regard to O'Connell. As such, we deem the issue with regard to this defendant is waived. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Plaintiff's allegation regarding Superior's hiring of DeFillippo is limited by the Supreme Court's holding in *Brown v Brown*, 478 Mich 545, 547-548; 739 NW2d 313 (2007). The Supreme Court held:

> where an employee has no prior criminal record or history of violent behavior indicating a propensity to rape, an employer is not liable solely on the basis of the employee's lewd comments for a rape perpetrated by that employee if those comments failed to convey an unmistakable, particularized threat of rape. [*Id*.]

In addition to the lack of foreseeability of the employee's future criminal act, the Supreme Court noted other considerations with respect to duty:

> The moral blame attached to the conduct in question, a rape, rests with the perpetrator . . . not with his employer. Also, there was a low degree of certainty of rape because there was not a "close" connection between [the employee's] statements and the resulting rape. And imposing a duty on [the employer] would not effectively further a policy of preventing future harm, and would impose an undue burden on [this employer] and all employers. [*Id.* at 556-557.]

Superior had no duty with respect to hiring DeFillippo or training others to prevent his engaging in a future sexual assault, because there has been no demonstration that such conduct was foreseeable when he was hired. DeFillippo claimed that he disclosed a past conviction for fraudulent use of a financial device on his application for employment with Superior. The Superior employee who hired DeFillippo stated that his criminal background check revealed no arrests or convictions. Even if this Court assumes that Superior had knowledge of DeFillippo's fraudulent use of a financial device, this criminal act did not serve to predict a propensity to commit criminal sexual conduct. Further, DeFillippo's coworker and supervisor stated that none of his behavior during the course of his employment with Superior suggested a propensity to commit a violent or sexual assault. Because DeFillippo's criminal sexual conduct was not foreseeable, Superior had no duty with respect to hiring DeFillippo and training other employees to prevent DeFillippo's criminal acts. As such, the trial court should have granted the motion for summary disposition regarding the claim that Superior was negligent in hiring and training DeFillippo.

Superior and O'Connell also contend that the trial court erred when it denied its motion to dismiss plaintiffs' negligent infliction of emotional distress allegations.

> A plaintiff may recover for negligent infliction of emotional distress where (1) the injury threatened or inflicted on the third person is a serious one, of a nature to cause severe mental disturbance to the plaintiff, (2) the shock results in actual physical harm, (3) the plaintiff is a member of the third person's immediate family, and (4) the plaintiff is present at the time of the accident or suffers shock "fairly contemporaneous" with the accident. [*Taylor v Kurapati*, 236 Mich App 315, 360; 600 NW2d 670 (1999).]

"These limitations insure against deceptive claims and restrict the cause of action to bystanders whom the tortfeasor could reasonably have foreseen might have suffered mental disturbance as a result of witnessing the accident." *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75, 81; 385 NW2d 732 (1986).

Plaintiff's claim is fatally flawed because he was not present to observe the criminal sexual conduct. Rather, he was driving in a separate vehicle behind the ambulance. Nevertheless, he claims that he suffered shock "fairly contemporaneous" with the accident when he learned of it two days later.

As discussed in *Gustafson v Faris*, 67 Mich App 363, 369; 241 NW2d 208 (1976), John Doe's delayed discovery of the assault of his daughter is "not materially different from the circumstances undergone by virtually all parents whose children have been injured in accidents which the parents did not witness." *Id.* Absent a genuine issue of material fact regarding whether John Doe suffered shock "fairly contemporaneous" to the accident, the trial court should have granted Superior and O'Connell's motion for summary disposition of the negligent infliction of emotional distress claim.

Reversed in part, affirmed in part and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot