18-P-1452 Appeals Court

OLGA LEDET & another[1] vs. MILLS VAN LINES, INC., & others.[2]

No. 18-P-1452.

Norfolk. December 9, 2019. - June 15, 2020.

Present: Green, C.J., Blake, & Kinder, JJ.

Negligence, Employer, Duty to prevent harm, Foreseeability of harm, Proximate cause. Proximate Cause. Practice, Civil, Summary judgment.

Civil action commenced in the Superior Court Department on August 20, 2014.

The case was heard by Thomas A. Connors, J., on motions for summary judgment.

Mark A. Aronsson (Patrick Driscoll also present) for the plaintiffs.
Bethany P. Minich for Mills Van Lines, Inc.
Barry M. Ryan for Allied Van Lines, Inc.

[1] Andrew W. Ledet.

[2] Allied Van Lines, Inc., and Robert Koontz.

GREEN, C.J. Shortly after midnight on August 27, 2011, Robert Koontz, an employee of Mills Van Lines, Inc. (Mills), brutally beat and sexually assaulted plaintiff Olga Ledet (Ledet) in Quincy, as she returned home from working a late shift. Koontz, who had an extensive criminal history and a history of drug and alcohol abuse, had driven a U-Haul truck rented by Mills to Massachusetts where he was preparing to move a Mills customer the following day, but he was off duty at the time of the attack.[3]

Ledet and her husband (together, the Ledets), brought the present action against Mills in the Superior Court claiming, among other things, negligent hiring, retention, and supervision, and asserting claims based on respondeat superior and loss of consortium.[4] Thereafter, the Ledets amended their complaint, adding Allied Van Lines, Inc. (Allied), as a defendant and raising claims under G. L. c. 93A. A Superior Court judge allowed the separate motions of Mills and Allied for summary judgment on all claims, concluding that the Ledets' injuries were not foreseeable because there was no nexus between

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[3] Despite a company policy requiring it to do so, Mills did not perform a criminal background check before hiring Koontz. Mills also overlooked evidence that Koontz was not licensed to drive a motor vehicle.

[4] The complaint also raised intentional tort claims against Koontz.

the attack and Koontz's employment; Mills and Allied owed no legal duty to the Ledets; and the facts were inadequate to raise a triable issue of proximate causation.[5] Final judgment entered in favor of Allied and Mills on June 19, 2018, and the Ledets appealed.[6] We affirm.

Background. We set forth the facts in the light most favorable to the Ledets, drawing all permissible inferences in their favor. See Jupin v. Kask, 447 Mass. 141, 143 (2006). Based in Strongsville, Ohio, Mills is engaged in the business of providing residential moving services throughout the continental United States. Pursuant to a written agency agreement dated May 1, 2010 (agreement), Mills was an agent of Allied, an international motor carrier licensed by the United States Department of Transportation to transport household goods across State lines. As an agent of Allied, Mills was required to comply with Allied's rules and regulations. Under Allied's safety policy, including its certified labor program, Mills was obliged to complete criminal background checks on all applicants for "rider-helper" positions, as well as individuals expected to

[5] The judge dismissed the G. L. c. 93A claims on two grounds: "the absence of tort liability" and the absence of a business transaction or relationship between the parties.

[6] The Ledets voluntarily dismissed their claims against Koontz and waived their claim predicated on respondeat superior against Mills, but not their parallel claim against Allied.

conduct the business of Allied at the homes and businesses of customers. In addition, the agreement required that all drivers of shuttle trucks, including rental vehicles, be "Allied qualified."[7]

In June 2011, Mills rehired Robert Koontz as a "helper" without performing a criminal background check or drug screen.[8] A background check would have revealed that Koontz had an extensive criminal record, including more than twenty arrests, ten felony convictions, and five incarcerations in three States. Koontz's convictions from 2004 to 2011 included such crimes as inciting violence, threatening domestic violence by use of a hammer, burglary, and aggravated theft. He also had motor vehicle related convictions, including driving under the

[7] Allied imposed more stringent requirements on applicants for driver positions than those imposed on rider-helpers. For example, no driver could be certified without passing a road and substance abuse test, a physical examination, and an extensive background check covering employment history and criminal record. Allied maintained its own driver qualification department to oversee the qualification process.

[8] Koontz was first hired on May 18, 2007, while he was under indictment for possession of cocaine. Whether Koontz was certified following the completion of a criminal background check at that time was disputed. Within a week after he was hired, Koontz was arrested and charged with operating under the influence of alcohol. His employment ended with his incarceration on or about June 14, 2007.

influence, operating without a valid driver's license, and unauthorized use of a vehicle.[9]

Mills acknowledged that the omission of a background check was a "pure failure in process." A Mills principal testified at his deposition that the majority of applicants for helper positions had difficulty passing background screens due to criminal records and drug use and that most did not have valid driver's licenses. At some point, Mills as a practice elected not to perform any type of background checks on helpers.[10] In some cases, Mills knowingly sent uncertified, unlicensed helpers who could not pass background checks to work on Allied shipments.

For three months after his rehiring, Koontz worked in tandem with one of Mills's drivers, Robert Oliver, assisting with interstate relocations. Koontz admitted that he was an "avid drug user, alcohol, everything under the sun," on a daily basis during this time period. On up to six occasions, Mills

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[9] Other convictions included receiving stolen property (belonging to customers of another moving company), drug trafficking, contempt, and grand theft.

[10] We note that in 2011, the fee charged for a criminal background check by the Massachusetts Criminal History Systems Board was thirty dollars. The qualification fees for prospective drivers were much higher (one hundred dollars for a background and criminal investigation and thirty-five dollars for preemployment drug testing). Over time, this practice of failing to subject its U-Haul truck drivers to the Allied qualification process saved Mills significant money.

required Koontz to operate a U-Haul truck as part of his job duties.[11] The two passed through at least twelve States in the course of their work.

In late August 2011, Mills assigned Oliver and Koontz to a moving job for a customer in Quincy. Due to the size and location of the job, two vehicles were required: an eighteen-wheel tractor trailer and a U-Haul rental truck to be used as a shuttle. The two left Ohio in a tractor trailer on their way to Massachusetts, and stopped in New York to pick up a U-Haul truck reserved in Oliver's name.[12] Mills arranged for and paid for the U-Haul truck rental. Oliver and Koontz proceeded to Massachusetts, with Oliver operating the tractor trailer followed by Koontz in the U-Haul truck. Despite knowing that Koontz did not have a valid license, Oliver instructed Koontz to drive the U-Haul truck to Massachusetts.

When Oliver and Koontz arrived in Quincy around 6 P.M. to 6:30 P.M. on August 26, 2011, the two parked the vehicles side-

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[11] Koontz held no valid driver's license, a fact readily apparent from his identification card stamped "NONDRIVER" submitted to Mills with his application. Mills expected any helpers who did not possess valid driver's licenses to speak up and decline to operate vehicles, but Koontz did not do so. U-Haul trucks were used in approximately one-third of Mills's moves.

[12] As a practice, Mills generally reserved U-Hauls in the names of its drivers, and not in the names of the "rider-helpers" required to drive them.

by-side in a parking lot on Liberty Street near the customer's house. Under Mills's policy, the U-Haul truck was required to remain with the tractor trailer. The work day ended at that point. Koontz purchased some beer and returned to the tractor trailer, where the men planned to sleep that night. Koontz made a cell phone call to his girlfriend that upset him. The men then separated for the night, planning to begin packing in the morning. Oliver walked to a local pub to play pool and eat dinner. Koontz spent the rest of his evening drinking alcohol and getting high on drugs obtained somewhere in Quincy. Around 9:30 P.M., Koontz showed up at the Southside Tavern, which was located down the street from the parked trucks.[13] At some point, the owner stopped serving Koontz alcohol. Koontz became belligerent, started yelling, and bumped into a female customer. Koontz was then asked to leave the tavern, and he left sometime between 11 P.M. and 11:30 P.M. Koontz testified that he had no memory of subsequent events. When Oliver returned to the parking lot on Liberty Street around 1 A.M., the U-Haul truck was gone.

Shortly after midnight, Ledet arrived at the Quincy Center Massachusetts Bay Transportation Authority station on her way home from work. She walked out of the station along Burgin

[13] It is unclear whether Koontz walked or drove to the tavern.

Parkway, turning onto Granite Street. When she heard the sound of a loud truck approaching, she turned around and saw a truck driving very quickly along Burgin Parkway and turn toward her on Granite Street. There were no other people around. As she continued walking on Granite Street, she saw the driver of a U-Haul truck, a young white male, slow down and stare at her. The truck sped up and continued on. She thought to herself, "Who can drive so fast . . . at this time of the night?" A short time later, she saw a shadow behind her on the sidewalk. The shadow grew into the shape of a man (later identified as Koontz), whom she allowed to pass her. As the man continued to walk ahead, he kept looking back at Ledet. After she turned on to a side street and walked a few hundred feet, Koontz grabbed her from behind, whispered, "I'm going to fuck you," dragged her into the woods, and violently assaulted her. Ledet tried to fight Koontz off, but he punched her in the face and threw her to the ground. A neighbor heard her screams and called the police. When Koontz heard the sirens, he fled toward Granite Street in the direction of the U-Haul truck. The police apprehended Koontz in the rear lot of 125 Granite Street and arrested him. The U-Haul truck was found, not at the location where it had been parked for the night alongside the tractor trailer, but in a parking lot on Granite Street, less than one-

quarter of a mile from the crime scene, with the doors unlocked, the windows open, and the keys on the driver's seat.

Koontz subsequently pleaded guilty to kidnapping, assault with intent to rape, indecent assault and battery on a person over fourteen, and assault and battery, and was sentenced to ten to thirteen years in State prison. Three days after the attack, Mills requested a criminal background check that established that Koontz "did not meet company standards." Mills is no longer an Allied agent.

Discussion. a. Standard of review. Summary judgment may be granted if the moving party shows that there is no genuine issue as to any material fact and it is entitled to judgment as a matter of law. See Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). "The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. . . . Any doubts as to the existence of a genuine issue of material fact are to be resolved against the party moving for summary judgment." Lev v. Beverly Enters.-Mass., Inc., 457 Mass. 234, 237 (2010). Our review is de novo. See Doe v. Boston Med. Ctr. Corp., 88 Mass. App. Ct. 289, 290 (2015).

b. Negligence. In order to succeed on a negligence claim, "a plaintiff must prove that the defendant owed the plaintiff a duty of reasonable care, that the defendant breached this duty, that damage resulted, and that there was a causal relation

between the breach of the duty and the damage." Jupin, 447 Mass. at 146.

It seems plain that Mills was negligent in its inquiries into Koontz's background at the time it rehired him; indeed, its failure to conduct a background check violated its own policies. But that negligence is too attenuated from the harms suffered by the Ledets to furnish a basis of liability on the part of Mills under our law. Although proximate causation is generally a question of fact for the jury, it may be decided as a matter of law. See Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 44-45 (2009). The concept of foreseeability defines both the limits of a duty of care and the limits of proximate causation. See Whittaker v. Saraceno, 418 Mass. 196, 198-199 & n.3 (1994); Belizaire v. Furr, 88 Mass. App. Ct. 299, 304-305 (2015). As a matter of law, Koontz's criminal acts, committed while Koontz was off duty and not engaged in the work for which Mills employed him, against a person with whom Mills held no commercial or other relationship, was not a sufficiently foreseeable result of Mills's hiring of Koontz, or its decision to allow him to drive a truck incident to the move to which he was assigned.

The two cases most closely similar to the circumstances of the present case are Coughlin v. Titus & Bean Graphics, Inc., 54 Mass. App. Ct. 633 (2002), and Heng Or v. Edwards, 62 Mass. App.

Ct. 475 (2004). In Coughlin, the employer was not liable for its employee's murder of the plaintiff's decedent, committed while the employee was off duty, and where the murder was in any event not a foreseeable consequence of the employer's hiring of the employee for duties that did not in the ordinary course involve contact with members of the public. Coughlin, supra at 639-641. In Heng Or, by contrast, the employer was held liable for injuries caused by the criminal acts of its employee, a handyman, who was given a passkey to gain access to units in an apartment building; the employee's potential contact with tenants of the apartment complex, and (based on his history of violent conduct) potential commission of acts of violence against them was held foreseeable, giving rise to liability on the part of the employer. Heng Or, supra at 487-489. We consider the facts of the present case to be far closer to those in Coughlin than those in Heng Or, as Ledet was not among those with whom Koontz's employment brought him into contact, and his employment did not furnish the means by which he executed his criminal act.[14]

[14] Foster v. The Loft, Inc., 26 Mass. App. Ct. 289 (1988), similarly lends no support to the Ledets' cause. In Foster, we held an employer liable when its employee, a bartender with a violent past, beat a customer, based on the conclusion that employers whose employees come into contact with the public owe a duty of care of reasonable selection of their employees. Id. at 294-295. As we have observed, Ledet was not a customer of Mills and had no other relationship with it. The case would

As the Ledets frame their argument (a view shared by our dissenting colleague), the critical link in the chain of causation (or foreseeability) is their characterization of the U-Haul truck as an instrumentality of Koontz's criminal assault. That might be a valid characterization if Koontz had run over Ledet, or even if he had pulled her into the cabin or cargo compartment of the truck to assault her. See, e.g., Malorney v. B & L Motor Freight, Inc., 146 Ill. App. 3d 265, 267-269 (1986). In the present case, however, the role of the truck was far more attenuated from the injuries suffered by the Ledets. To be sure, the truck was the means by which Koontz traveled from Ohio to Massachusetts, and also, on the night of the assault, the means by which he drove down the roadway next to which Ledet was walking when Koontz spotted her. But Koontz parked the truck, got out, approached Ledet from behind on foot, and then dragged her into the woods where he assaulted her. None of the authorities on which the Ledets rely, and none of which we are aware, recognizes a duty based on such an attenuated connection between an instrumentality and potential harms caused by its use. In our view, the present case is controlled by Coughlin, 54 Mass. App. Ct. at 639-641, and Koontz's criminal assault of

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stand differently if Koontz had assaulted a Mills customer during the course of a move.

Ledet was not a foreseeable consequence of any negligence of Mills in hiring him to serve as a helper in a moving crew.[15]

Judgment affirmed.

[15] Because the Ledets' claims against Allied for respondeat superior are derivative of their negligence claim against Mills, our conclusion that Mills is not liable in negligence also disposes of the claims against Allied. In addition, the Ledets' c. 93A claims fail as matter of law because they cannot show that the defendants "engaged in trade or commerce with [them] within the meaning of G. L. c. 93A." Miller v. Mooney, 431 Mass. 57, 65 (2000). See G. L. c. 93A, § 2 (a) (declaring unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce").

BLAKE, J. (dissenting). Because I believe that Mills had a legal duty to the Ledets, I respectfully dissent. The majority overlooks the current Restatement of Torts and fails to acknowledge that the relationship between an employer and employee has long been recognized as a special relationship that may give rise to a duty of care. An employer may owe a duty of reasonable care to a plaintiff "when the employment facilitates the employee's causing harm to third parties."[1] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 41 (2012) ("Duty to Third Parties Based on Special Relationship with Person Posing Risks") (§ 41) at § 41(b)(3). See § 41 comment e, at 66. Employment is said to facilitate harm to others "when the employment provides the employee access

[1] The Restatement (Second) of Torts § 317 (1965) (§ 317) placed a limited duty on masters to control the conduct of their servants. The Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 41 (2012) (§ 41) replaced that section along with others relating to special relationships. See Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 41 n.10 (2009). Section 41 fundamentally changed the employer's duty imposed by § 317. See Reporters' Note to § 41 comment c, at 73 (under § 317, employers had the duty to control the conduct of their employees "only if they knew or had reason to know of their ability to control and knew or had reason to know of the necessity of and opportunity for control"; under § 41, those conditions are no longer prerequisites for existence of duty, but are subsumed in analysis of reasonable care). Although the Supreme Judicial Court has not formally adopted § 41, it has recognized and applied its principles in several cases. See, e.g., Roe No. 1 v. Children's Hosp. Med. Ctr., 469 Mass. 710, 714 (2014); Lev v. Beverly Enters.-Mass., Inc., 457 Mass. 234, 243-244 (2010).

to physical locations, such as the place of employment, or to instrumentalities . . . or other means by which to cause harm that would otherwise not be available to the employee." Id. at 67.[2]

Here, Mills provided Koontz with unsupervised access to a U-Haul truck -- the instrumentality that facilitated his crimes. This result is consistent with our holding in Heng Or v. Edwards, 62 Mass. App. Ct. 475, 485 (2004), where an employer was liable because it entrusted passkeys to a violent criminal with drug and alcohol problems. Similarly, Mills entrusted Koontz with "the temptations and opportunities [of the U-Haul truck] . . . to an unfit person." Id. As in Heng Or, Koontz's crimes would have been "more precarious [and] less tempting" to commit if he had not had access to the U-Haul truck that provided him mobility, cover, and the potential for a quick getaway. Id.

Simply put, Mills's employment of Koontz facilitated the harm to the Ledets within the meaning of the provisions of the

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[2] The duty covered by § 41(b)(3) encompasses the duty to exercise reasonable care in the hiring, training, supervision, and retention of employees. See § 41 comment e, at 66. Section 317 imposed a duty on a master owed to third parties for the acts of servants occurring on the master's premises (or those to which the servant was provided access) as well as acts occurring when the servant was using a chattel of the employer. Section 41 was intended to capture those concepts, but also to provide courts with "a bit of flexibility confronting unusual situations." Reporters' Note to § 41 comment e, at 75.

Restatements. Cf. Peters v. Haymarket Leasing, Inc., 64 Mass. App. Ct. 767, 775 (2005) (taxi provided by defendant was instrumentality of work). See Mulloy v. United States, 884 F. Supp. 622, 631 (D. Mass. 1995) (liability may be found "if the defendant negligently facilitates the commission of a crime by the third person, for example . . . by placing that person in a position where he could commit an offense").[3]

Mills disregarded its own policies and those of Allied with respect to the hiring, retention, and supervision of Koontz. These policies demonstrated an awareness of the risk posed to customers and to the general public. That Mills was unaware of Koontz's history of violent crimes and substance abuse by reason of its failure to conduct a background check does not excuse its ignorance. See Malorney v. B & L Motor Freight, Inc., 146 Ill. App. 3d 265, 268-269 (1986), (rejecting employer's argument that rape and assault were not foreseeable by noting that "[l]ack of forethought may exist where one remains in voluntary ignorance of facts concerning the danger in a particular act or

[3] An actor may also be held liable for affirmatively creating the conditions that allowed the third party to perpetrate the crimes. See Jupin v. Kask, 447 Mass. 141, 148 (2006), quoting Restatement (Second) of Torts § 302B, comment e (1965) ("reasonable person [is] required to anticipate and guard against criminal misconduct 'where the actor's own affirmative act has created or exposed the [victim] to a recognizable high degree of harm through such misconduct, which a reasonable man would take into account'").

instrumentality, where a reasonably prudent person would become advised, on the theory that such ignorance is the equivalent of negligence").

Whether Mills foresaw the particular harm that befell the Ledets was "irrelevant." Coombes v. Florio, 450 Mass. 182, 189 (2007) (Ireland, J., concurring). Tort law requires only that the same general kind of harm was a foreseeable consequence of the defendant's conduct. See Jupin v. Kask, 447 Mass. 141, 149 n.8 (2006). Moreover, that Koontz was acting outside the scope of his employment is no reason to reject the imposition of a duty. If the employment facilitated the harm, § 41 extends the duty of employers to conduct by the employee occurring outside the scope of employment. See § 41 comment e, at 66.

Of course Koontz's mere presence in Quincy occasioned by his employment, without more, did not create a legal duty. The decision to entrust the U-Haul truck to Koontz was entirely within Mills's control and discretion. It is not unreasonable to expect employers to make entrustment decisions carefully after being informed of the facts. Mills was in position to protect against a significant risk of harm to third parties. See § 41 comment c, at 65 (duty imposed by § 41 is to "take reasonable steps, in light of the foreseeable probability and magnitude of any harm, to prevent it from occurring"). Contrast Lev v. Beverly Enters.-Mass., Inc., 457 Mass. 234, 243-244

(2010) (where employer did not provide alcohol or vehicle used in accident, employment did not facilitate employee's ability to harm pedestrian, and no special relationship was found giving rise to duty of care).

The majority's reliance on Coughlin v. Titus & Bean Graphics, Inc., 54 Mass. App. Ct. 633 (2002), is misplaced. The employee in Coughlin was on parole, and had been deemed rehabilitated by professional evaluations, all of which was known by the employer. See id. at 640 & n.9. Here, in contrast, Mills did nothing to determine Koontz's suitability for employment. Indeed, a criminal background check would have resulted in the immediate rejection of Koontz as unsuitable for employment based on his history of violent crimes and substance abuse, all of which could foreseeably cause harm to third parties if he was left unsupervised.[4] And, in contrast to Mills, the employer in Coughlin did not knowingly provide an instrumentality that facilitated the harm.

Notably, Coughlin was decided before the promulgation of the § 41 principles that guide my analysis. Moreover, the Supreme Judicial Court first considered whether a special

[4] Any concern that employers will be dissuaded from hiring individuals with criminal records misses the point. See Foster v. The Loft, Inc., 26 Mass. App. Ct. 289, 295 (1988) ("[O]ur decision does not mean that an employer cannot hire or retain a person known to have a criminal record").

relationship between an employer and an employee caused a plaintiff harm seven years after Coughlin was decided. Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 41 n.10 (2009). For these reasons, Coughlin lends little support to the majority's analysis.

Here, multiple foreseeable harms flowed from Mills's failure to inquire about Koontz's criminal history, its failure to confirm Koontz's driving status, and its decision to give Koontz unsupervised access to the U-Haul truck. In short, it was not beyond the limits of reasonable foreseeability that a convicted felon with severe drug and alcohol addictions, entrusted with a vehicle, and left to his own devices between shifts, would commit these types of criminal acts. Section 41 imposes liability for the special relationship between an employer and an employee. Our courts have a tradition of adopting the Restatement and we should do so here. For these reasons, I respectfully dissent.