STATE OF MICHIGAN

COURT OF APPEALS

ELOISE HALL,

Plaintiff-Appellant,

v

CADILLAC NURSING HOME, DEL WHEELER, ROBBIE ROBINSON, CLAUDINE PAULING, and BETTY RUTHERFORD,

Defendant-Appellees.

UNPUBLISHED
January 18, 2000

No. 209010
Wayne Circuit Court
LC No. 97-709625 NF

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM

Plaintiff appeals of right the circuit court's grant of summary disposition to defendants under MCR 2.116(C)(10) in this negligence action. We reverse.

Defendant nursing home is a licensed facility that houses elderly patients and housed plaintiff's decedent. Plaintiff's complaint alleged that defendants knew or should have known of plaintiff's decedent's "medical history, medical and psychological condition, risks and needs, including a risk for relapse and/or escape due to dementia, depression and/or alcohol abuse." It further alleged that both a contractual and special relationship existed between defendants and plaintiff's decedent "by virtue of mutual agreement and through Defendants' contacts with and observations of him, particularly in light of the risk of harm posed by Defendants' lack of supervision." Plaintiff's complaint further alleged that defendants owed a duty "to properly supervise and care for" plaintiff's decedent and "to maintain his person in a reasonably safe condition protecting him from all foreseeable dangers." The complaint alleged that defendants "did not take and/or use ordinary care and diligence to avert the threatened danger despite the apparent risk of danger and harm," and that plaintiff's decedent's death was a direct and proximate result of defendants' negligent conduct. Plaintiff attached an affidavit of merit to her complaint in which a registered nurse attested that "the standard of care for nursing services rendered in an inpatient nursing care facility, when caring for an inpatient with Sid Hall's medical history, requires knowledge of a resident's whereabouts at all times," and opining that defendant and its agents breached the standard of care owed to Sid Hall.

Defendants' affirmative defenses included that decedent's injuries and damages were proximately caused in whole or part by decedent's own, or third parties' subsequent intervening negligence, or intentional conduct of parties other than defendants.

The record before us includes substantial medical records produced by defendant. These records state that on admission to defendant nursing home in January 1991 plaintiff's decedent's psychiatric history was summarized as follows:

> Mr. Hall has an extensive placement history due to conditions that appear to be associated with heavy alcohol abuse. He was first seen by GSS 12/18/88 for crisis intervention, dx [diagnosis] was unspec. [unspecified] Brain synd [syndrome] (294.9). He was disoriented x 2, memory impaired and staff *reported abusive behavior to staff and peers* and attempted a ULOA [unauthorized leave of absence]. There were also reports of hallucinatory behavior, ie [sic i.e.,] seeing things on his meal tray, he appeared depressed, and he reportedly engaged in public exposure. . . . [Emphasis added.]

A "Social History and Assessment" form states under "Expected Med-Social problems," medical history and current diagnosis: "seizure disorder, dementia Hx [history]." Nursing care notes dated January 26, 1991 state that decedent "[g]ets agitated whenever he does not get things his own way." Under "Reviewer Comments" a form dated February 16, 1991 states: "a behavior management problem and hallucinatory or delusional behaviors were observed at the time of the evaluation." A psychiatric evaluation performed in March 1991 states that decedent had "a long history of Alcoholism, depression, and repeated Psychotic episodes," and "[t]his male patient needs to be monitored very closely for any recurrence of any paranoid ideations *or violent outburst of tempers* [sic]." [Emphasis added.] A psychological consultation report dated January 31, 1992 states that decedent "denies any alcohol use and he knows that he can't drink with his medication," further stating "Sid leaves the building frequently in order to go to nearby stores. It's possible for him to obtain alcohol & charge staff should pay closer attention to his behaviors upon return from stores and be alert to the smell of alcohol around him." Progress notes dated February 1, 1992 state that decedent entered the employee break room where employees were talking and walked up to one of them, an employee named Patrick, and *started choking him, and that decedent was "very upset stating Patrick had lied about his drinking beer and that he was going to kill someone."* [Emphasis added.] A social service note dated April 7, 1992 states that plaintiff sent a letter stating that she was applying for a guardianship and that she did not want decedent to leave the nursing home unless with a nurse or family member. Progress Notes dated August 26, 1993 stated that decedent "does have brief periods of disorientation." Social service progress notes dated November 1, 1994 state that decedent had occasional periods of confusion, and a diagnosis that included dementia. Nursing care notes dated December 2 and December 17, 1994 state that decedent had suffered petit mal seizures. Nursing care notes dated May 4, 1995 pertinent to a resident care conference regarding decedent state that decedent "[m]akes frequent trips to the store if he has money—has been observed carrying beer under his coat or sweater. Resident has a seizure disorder – had a seizure app [approximately] 2 weeks ago."

Documentary evidence submitted below pertinent to the Michigan Department of Public Health's September 1995 investigation of decedent's having been missing from the facility and killed, states in pertinent part:

SUMMARY STATEMENT OF DEFICIENCIES . . .

483.13(c)(1)(I) The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property.

The facility must not use verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion.

This REQUIREMENT is not met as evidenced by

(BASED ON THE INFORMATION OBTAINED FROM EMPLOYEE STATEMENTS, FACILITY PROCEDURES, AND THE RESIDENT'S CLINICAL RECORD, THERE IS SUFFICIENT EVIDENCE TO SUPPORT THAT THE FACILITY FAILED TO FOLLOW THERE [sic] WRITTEN POLICIES AND PROCEDURES, AS A RESULT THE RESIDENT WAS NEGLECTED.

THE RESIDENT WAS ADMITTED TO THE FACILITY ON 01/25/95 [sic 91]. THE RESIDENT HAD A DIAGNOSIS THAT INCLUDED: SEIZURE DISORDER, ASHD (HEART DISEASE), DEMENTIA, DEPRESSION, PARANOIA, AND HISTORY OF ALCOHOL ABUSE. THE RESIDENT HAS A LEGAL GUARDIAN . . . . THE RESIDENT'S CARE PLAN IDENTIFIED THAT THE RESIDENT *EXPERIENCED DELUSIONS AND COULD BECOME PHYSICALLY/VERBALLY ABUSIVE* (RARELY OCCURRED). THE RESIDENT WAS PRESCRIBED HALDOL (PSYCHOTROPIC DRUG), AND PROZAC. THE RESIDENT WAS AT RISK FOR RELAPSE DUE TO ALCOHOL ABUSE (RESIDENT WOULD SNEAK OUT THE [sic] FACILITY AND GO TO THE CORNER STORE TO BUY BEER, BUT ALWAYS RETURNED AND WAS REDIRECTED AS NEEDED). *THE RESIDENT WAS SUSPICIOUS OF OTHERS, TALKED TO SELF, AND ARGUMENTIVE* [sic] AT TIMES.

NURSING EMPLOYEE #1 (SECOND SHIFT LPN) PROVIDED A WRITTEN STATEMENT THAT ON SATURDAY, 09/02/95 UPON ARRIVAL TO THE UNIT THE RESIDENT WAS ALERT AND RESPONSIVE DURING ROUNDS. THE RESIDENT RECEIVED DINNER (5:30 PM), AND MEDICATIONS WERE GIVEN AS ORDERED.

AT APPROXIMATED [sic] 6:30 PM NURSING EMPLOYEE #2 (FIRST FLOOR NURSE) HAD LEFT THE FACILITY (LUNCH BREAK) AND STATED THAT HE SAW RESIDENT AT A PARTY STORE (APPROXIMATELY 4.2 MILE [sic]

AWAY REPORTED THE ADMINISTRATOR). EMPLOYEE #2 STATED THAT THE RESIDENT WAS STANDING NEAR THE EXIT DOOR, BUT NO VERBAL EXCHANGE WAS MADE WITH THE RESIDENT.

NURSING EMPLOYEE #3 (MIDNIGHT NURSE) NOTED THAT AT 12:05 AM THE RESIDENT'S BED WAS VACANT, AND ASSUMED THAT THE RESIDENT WAS ON A LEAVE OF ABSENCE.

DURING THE REST OF THE WEEKEND ALL FACILITY STAFF MEMBERS ASSUMED THAT THE RESIDENT WAS ON A LEAVE OF ABSENCE WITH FAMILY MEMBERS. NO ONE CHOOSE [sic] TO VERIFY THE RESIDENT WHEREABOUT [sic]. HOWEVER, ON TUESDAY, 09/05/95 THE FACILITY WAS CONTACTED BY A FAMILY MEMBER WHO WANTED TO VERIFY IF THE RESIDENT WAS IN THE FACILITY, AND INFORMED THE FACILITY OF THE POLICE REPORT THAT THE RESIDENT HAD BEEN KILLED. REPORTEDLY, ALL THE FAMILY MEMBERS HAD BEEN OUT OF STATE FOR THE HOLIDAY WEEKEND (FACILITY NOT AWARE), AND HAD NOT TAKEN THE RESIDENT ON A LEAVE OF ABSENCE.

IT IS THE FACILITY POLICY AND PROCEDURE TO HAVE THE FAMILY/RESIDENT SIGN OUT THE [sic] FACILITY ON EACH LEAVE OF ABSENCE IN ORDER TO RELEASE THE FACILITY FROM ANY RESPONSIBILITY. THERE WAS NO RECORD/DOCUMENTATION OF THE RESIDENT BEING SIGNED OUT FOR THE WEEKEND.

* * *

THE FACILITY FAILED TO PROVIDE ADEQUATE CARE AND NEGLECTED THE RESIDENT BY NOT BEING AWARE OF THE RESIDENT WHEREABOUTS [sic]. THE FACILITY ASSUMED THAT THE RESIDENT WAS ON A LEAVE OF ABSENCE, BUT FAILED TO VERIFY. AS A RESULT THE RESIDENT'S HEALTH AND SAFETY WAS [sic] PUT AT RISK.

Witness statements pertinent to the Detroit Police Department's investigation of decedent's murder state that on the evening of his demise, decedent was seen pacing up and down the street for a long time, appeared lost and confused, drank beer with a man, became combative and struck the man on the head with a bottle, and that the man then stabbed decedent.

Plaintiff argues that a duty must be imposed on defendants in the instant case as a matter of law by virtue of their status of landlord and invitor and in light of the special relationship existing between the parties. Plaintiff also argues that the circuit court erroneously relied on cases inapplicable to the instant facts, specifically *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995). Plaintiff argues that the circuit court "ignored or was unaware of the fact that Mr. Hall himself was violent and

instigated criminal acts which foreseeably could be met with violence and retaliation, particularly in an area of high crime; specifically, the Court ignored Mr. Hall's status as a readily identifiable victim."[1]

A special relationship exists if the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself. *Murdock v Higgins*, 454 Mich 46, 54; 559 NW2d 639 (1997); *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988).

> . . . . "Special relationships" recognized under Michigan law include landlord-tenant, proprietor-patron, employer-employee, residential invitor-invitee, psychiatrist-patient, and doctor-patient. Other generally recognized "special relationships" include common carrier-passenger and innkeeper-guest.
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> * * *
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> The court will impose a "special relationship" duty only where a person's actions directly influence another. Michigan courts have defined as third parties only "those persons readily identifiable as foreseeably endangered." [*Marcelletti v Bathani*, 198 Mich App 655, 664; 500 NW2d 124 (1993).]

A special relationship existed between the parties in the instant case. Defendants assumed the care and supervision of plaintiff's decedent knowing that he suffered from dementia, paranoia, seizure disorder, alcoholism, and at times exhibited uncontrolled aggressive behavior against others.

The circuit court's opinion and order granting summary disposition stated in pertinent part:

> Generally speaking, questions of proximate cause are resolved by a jury. However, where reasonable minds cannot differ regarding proximate cause, the court should rule as a matter of law. *Babula v Robertson*, 212 Mich App 45, 54 (1995). Proximate cause means such cause as operates to produce particular consequences without intervention of any independent, unforeseen cause, without which the injuries would not have occurred." *Id.*
>
> For purposes of this motion, the court will assume: (1) that the decedent was known to leave the home to procure alcohol; (2) that the guardian instructed defendant not to allow the decedent to leave the home without permission; (3) the defendant agreed not to allow the decedent to leave the home unescorted; and (4) the area in which the home was located was known as an area unusually susceptible to crime.
>
> Michigan law is clear that random criminal acts of third persons are not foreseeable unless (1) an invitor knew or had reason to know of a specific criminal act that was intended for the specific victim; or (2) defendant did something to create a condition conducive to criminal assaults. *See Mason v Royal Dequindre*, 455 Mich 391 (1997); *Babula* [*supra*]; *Stanley v Town Square Co-op*, 203 Mich App 143 (1993); *Papadimas v Mykonos Lounge*, 176 Mich App 40 (1989).

> In the present case, the court finds no evidence upon which to conclude that the criminal act was foreseeable. The only evidence regarding foreseeability is that the defendants' facility was in a very high crime district. No Michigan appellate court has ever found this fact alone enough to make random criminal acts foreseeable to invitors in the high crime area. The court further finds no evidence that defendant created a condition conducive to criminal assaults.
>
> Viewing the evidence in a light most favorable to plaintiff, defendant merely maintained its facility in a manner that allowed plaintiff to leave the facility without an escort, thereby exposing plaintiff to a risk inherent in our society: the risk of being exposed to criminal assault. Defendants' conduct did not increase the societal risk to which plaintiff was exposed when he left defendants' facility. For these reasons, defendants' motion is GRANTED.

We agree with plaintiff that *Babula, supra*, is factually distinguishable from the instant case. In *Babula*, the plaintiff mother dropped her nine-year-old child off one morning at the home of the child's aunt and uncle; the aunt having agreed to baby-sit. The defendant aunt, Janice Robertson, returned to bed for a few minutes, during which time the defendant uncle, Brian Robertson, who had come home several hours earlier drunk and not speaking clearly, molested the child. The plaintiff brought a negligence action against her sister, the child's aunt. The circuit court granted summary disposition to the defendant aunt, concluding that although the aunt had voluntarily assumed control over the child's safety and thus had a duty to use reasonable care in ensuring that the child's well-being was not endangered, the uncle's acts were wholly unforeseeable. This Court concluded that the aunt's general duty of care while baby-sitting did not extend to the specific harm inflicted by the uncle. *Babula, supra* at 51-52.

> . . . . When the incident occurred, Janice had been married to Brian for almost ten years. There is no suggestion that, before molesting the child, Brian ever had engaged in any criminal behavior. . . . The mere fact that Brian was allegedly intoxicated when Janice went to sleep was not sufficient to put her on notice that Brian might injure the child.
>
> Plaintiff argues that the proper inquiry is whether some, not necessarily the sexual molestation injury, was foreseeable. In support of her contention, plaintiff relies on *Clumfoot v St Clair Tunnel Co*, 221 Mich 113; 190 NW 759 (1922). In *Clumfoot*, the Michigan Supreme Court found that, in order for harm to be foreseeable, it is not necessary that the manner in which a person might suffer injury be foreseen or anticipated in specific detail. *Id.* at 117. While we agree that the correct inquiry is not the foreseeability of the specific manner in which the child was injured, we nevertheless find that it was not foreseeable that Brian would injure the child.
>
> Foreseeability is also relevant with regard to the issue of proximate cause. *Berry v J&D Auto Dismantlers, Inc*, 195 Mich App 476, 481; 491 NW2d 585 (1992).

> The questions of duty and proximate cause are interrelated because the question whether there is the requisite relationship, giving rise to a duty, and the question whether the cause is so significant and important to be regarded a proximate cause both depend in part on foreseeability. [*Moning v Alfono,* 400 Mich 425, 439; 254 NW2d 759 (1977).]

Neither *Babula* nor the other cases on which the circuit court relied involved facts similar to the instant case, i.e., a residential nursing home defendant and injury to a patient whom defendant knew suffered from mental and physical illnesses and at times acted aggressively and violently toward others. *Mason, supra,* and *Stanley* were premises liability cases in which patrons of the defendant bar owners were injured by other patrons. *Papadimas, supra,* was also a premises liability case in which the plaintiff, a guest of a tenant in the defendant's cooperative, was assaulted and raped in the parking lot. In none of these cases was it alleged that the *victim* was readily identifiable as foreseeably endangered.

Although there is apparently no Michigan case involving such a situation, *Bradley v Central Naugatuck Valley Help, Inc,* 25 Conn L Rptr 178; 1999 WL 596359 (Conn Super, July 29, 1999), involved facts similar to those involved here. The plaintiff had been a patient in a facility run by the state's Department of Mental Health for treatment relating to a traumatic brain injury, seizure disorder and alcoholism. The plaintiff was released from that facility in February 1993 and placed in a community residence owned and operated by the defendant. In April 1993, the plaintiff's decedent was struck by a car after leaving the facility, without authorization, to buy alcohol. In concluding that genuine issues of fact remained regarding whether the defendants owed a duty of reasonable care to plaintiff, the court noted:

> The defendants also argue that the plaintiff was a voluntary resident and that they had no right to detain or confine him and therefore had no duty of care towards him. However, "it is said that when a patient enters a hospital maintained for private profit, he is entitled to such reasonable attention as his safety may require; and if he is temporarily bereft of reason, and is known by the hospital authorities to be in danger of self-destruction, the authorities are in duty bound to use reasonable care to prevent such an act." *Hawthorne v. Blythewood, Inc.,* 118 Conn. 617, 623, 174 A. 81 (1934), quoting *Muliner v. Evangelischer Diakonniessenverein,* 144 Minn. 392, 294 [sic], 175 N.W. 699 [1920]. Although the defendant . . . is not a hospital, it is a facility for the care and treatment of mentally ill adults that receives consideration for doing so. The defendants received consideration for taking the plaintiff in as a resident. They knew or should have known about his problems with alcoholism and his tendencies to leave the facility to buy alcohol and become intoxicated. Even if the plaintiff's residency was voluntary, the plaintiff's voluntary submission to the defendants' authority raises an implied obligation on the part of the defendants to give the plaintiff such reasonable care and attention for his safety as his mental and physical condition required because the defendants received compensation for caring for the plaintiff and knew of the plaintiff's condition. See *Hawthorne v. Blythewood, Inc., supra,* 118 Conn. 623.

We conclude that plaintiff presented sufficient evidence of a special relationship to support both the existence and breach of a duty of care owed to by defendants to decedent.

Regarding proximate cause, "an intervening cause breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability, unless it is found that the intervening act was reasonably foreseeable." *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985).

Plaintiff presented evidence that plaintiff's decedent was an identifiable victim foreseeably endangered. Defendants had actual notice of plaintiff's decedent's mental illness, confusion, seizure disorder, alcoholic dementia and occasionally aggressive and violent conduct toward others. Defendants were aware that decedent often attempted to leave the premises without authorization in order to buy alcohol, and were aware that he should not drink when medicated. Thus, there was evidence supporting that decedent was not killed simply as a victim of random and unforeseeable criminal conduct unrelated to decedent's condition and defendants' duty of care. Had decedent been shot by someone robbing the store, we would agree that while defendants' failure to exercise due care for decedent's safety would be a cause in fact of decedent's death in the sense that it would not have occurred had decedent not been permitted to leave the premises, it would not be a proximate cause of the death resulting from the unforeseeable criminal attack. However, there was evidence here that decedent was not a random victim of unpredictable violence, but that decedent's foreseeable behavior provoked the assault that caused his death. We therefore conclude that the circuit court erred in determining that reasonable minds could not differ regarding whether defendants' actions were a proximate cause of plaintiff's decedent's demise.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Kathleen Jansen

[1] We do not agree with the dissent that plaintiff failed to raise below the argument that defendants were on notice of plaintiff's decedent's aggressive tendencies. Plaintiff's brief in response to defendants' motion for summary disposition stated, and supported with documentary evidence, that

> Physicians again advised the staff to monitor Mr. Hall's behavior closely relative to any paranoid ideation or violent outbursts of temper (See also March 8, 1992 treatment plan as offered by Dr. S. Braalikar, (attached as part of Exhibit A).
>
> On March 11, 1991, subsequent to Plaintiff's initial admission into the home, a clinical summary again was secured by Defendant's staff. In this summary it was noted that Mr. Hall had a heavy history of alcohol abuse and a history of disorientation, impaired memory and abusive behavior towards the staff.

The brief later states:

Defendants were aware that Mr. Hall had a tendency to drink, hallucinate and act aggressively. . .