IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ESTATE OF MOHAMAD-IMAD NAZIR "DIMITRI" HARB, by its Personal Representative Fawzieh Harb, on behalf of the Estate and its beneficiaries, Appellant, v. KING COUNTY SHERIFF'S OFFICE, a department of King County; KING COUNTY, a municipal corporation, Respondents, FERENC ZANA, in his individual capacity and in his capacity as former King County Deputy Sheriff; CHESTNUT HILL ASSOCIATES, INC., a Washington corporation doing business as The Empire Bar & Grill; and CHRISTOPHER BISTRYSKI, Defendants.	No. 64833-1-I DIVISION ONE UNPUBLISHED OPINION FILED: June 27, 2011

Becker, J. — A King County sheriff's deputy left his loaded handgun on the kitchen counter when he went to bed. His roommate took the gun and used it to murder a clerk at a nearby convenience store. The decedent's estate attempts to hold King County liable for wrongful death. Because the actions of

the deputy did not occur in the course of his employment, the county is not vicariously liable. And because the county did not have reason to know the deputy would be careless with his gun, the evidence was insufficient to support the estate's alternative theories of negligent entrustment and negligent supervision. Dismissal on summary judgment was proper.

The officer involved was Ferenc Zana, hired as a King County sheriff's deputy in 1985. Beginning in 2004, Zana shared his house with Christopher Bistryski. In December 2004, Seattle police pulled Bistryski over and found that he was driving Zana's personal car. The Seattle police advised the King County Sheriff's Office that Bistryski was a convicted felon. He had been convicted of burglary for stealing guns when he was 15 years old.

In March and April of 2005, Bistryski twice attempted suicide. Other sheriff's deputies responded each time and were met with violent resistance by Bistryski. Bistryski was viewed as a clear danger to himself and others. A sergeant counseled Zana about the dangers of having such an unstable person as a roommate and advised him to obtain a gun safe. Zana replied that he kept his police equipment "in a room that Bistryski was unable to access."

On the evening of August 19, 2005, Zana and Bistryski spent the evening at home. Bistryski was drinking. Later, Bistryski went out by himself to a bar, where he got into several fights. Someone called Zana and asked him to come and take Bistryski home. He did so. Upon their return home, Zana went to bed, carelessly leaving his personal firearm on the kitchen counter with his badge

and identification card. The gun was a Glock 27 fully loaded with bullets issued by the sheriff's office. Bistryski took the gun, left the house, and shot at a passing motorist. Zana heard this shot, realized it was Bistryski, and called 911. Meanwhile, Bistryski walked into a convenience store and began shooting. The clerk, Mohamad-Imad Nazir "Dimitri" Harb, retreated to the back of the store. Bistryski followed and shot Harb to death. He then returned home. Zana met him outside, disarmed him, and turned him in.

In February 2009, Harb's estate filed a complaint for damages against King County, Zana, and the owner of a bar that allegedly overserved Bistryski. Only the claim against the county is involved in this appeal. The trial court granted the county's motion for summary judgment dismissal. This appeal followed.

"In reviewing orders on summary judgment, this court engages in the same inquiry as the trial court." Rahman v. State, 150 Wn. App. 345, 350, 208 P.3d 566 (2009), aff'd, 170 Wn.2d 810, 246 P.3d 182 (2011). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

VICARIOUS LIABILITY

It is undisputed that Zana was negligent for failing to secure his handgun on the night of the murder. The estate argues that King County is vicariously liable. The county responds that Zana was not acting in the course of his

employment.

"While determining the scope of employment is normally a jury question, where there can be only one reasonable inference from the undisputed facts, the issue may be resolved at summary judgment." Rahman, 150 Wn. App. at 351.

Washington has a test for determining whether an employee was, at any given time, in the course of his employment. The test is whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, or by specific direction of his employer; or, as sometimes stated, whether he was engaged in the furtherance of the employer's interest. Dickinson v. Edwards, 105 Wn.2d 457, 467, 716 P.2d 814 (1986).

Zana was "off duty" when he left his personal handgun on the kitchen counter, unsecured and loaded. The estate claims that in maintaining a loaded gun in his residence, Zana was furthering his employer's interest in public safety and officer protection.

In a way, a police officer is never truly off duty. As the estate points out, under the common law, police officers are considered to be under a duty to respond as police officers 24 hours a day. State v. Graham, 130 Wn.2d 711, 718, 927 P.2d 227 (1996). But the common law does not obligate an officer to keep a loaded firearm available and ready 24 hours a day. Similarly, the fact that the legislature has exempted police officers from the requirement of obtaining a permit to carry a concealed weapon, RCW 9.41.060(1), does not amount to an official encouragement for officers to remain armed while off duty.

That the county sheriff's office regulates some aspects of off-duty use of firearms and ammunition does not mean the county encourages officers to carry firearms when off duty. It shows only that the county, recognizing that some officers will carry secondary firearms when off duty, has set standards for carrying the firearm if the officer chooses to carry one.

Dickinson, on which the estate relies, holds that an employee's off-duty actions will be within the scope of employment if there is sufficient evidence that the actions were taken for the benefit of the employer. In that case, the employer hosted a company banquet "to enhance employee relations." Liquor was served at the banquet, and one of the employees became drunk and caused injury while driving. There was evidence that the company "'encouraged and expected'" its employees to attend the banquet, thereby creating a jury question whether attendance by employees was "impliedly or expressly required." Dickinson, 105 Wn.2d at 469.

The estate also relies on Vollendorff v. United States, 951 F.2d 215 (9th Cir. 1991). In Vollendorff, a Ninth Circuit Court of Appeals decision applying Washington law, the court held that the Army could be found vicariously liable for the negligence of an officer who left an antimalarial medication out on the kitchen counter. The Army wanted the officer to take the medication in preparation for a tour of duty in the tropics. The medication is extremely dangerous to children, and the officer's granddaughter found it, consumed one of the pills, and was left with permanent brain damage. Storage of the

medication in the officer's home was incidental to its use. Accordingly, the officer's actions were within the scope of his employment.

This case is not like Dickinson or Vollendorff. Zana made a personal choice to be armed when off duty. There is no evidence that the sheriff's office "encouraged and expected" him to do so, or would have expressed disappointment with him if he chose not to keep firearms at home. See McNew v. Puget Sound Pulp & Timber Co., 37 Wn.2d 495, 498-99, 224 P.2d 627 (1950) (employee not within scope of employment while on weekend trip to visit family, even though he picked up supplies for employer, because his employment did not necessitate the trip).

In sum, the estate has not presented evidence of an implied or express requirement that deputies carry or store firearms while off duty. The record does not support a reasonable inference that Zana was acting in the scope of his employment when he stored his gun at home.

DIRECT LIABILITY – NEGLIGENT SUPERVISION

As an alternative to the theory of vicarious liability, the estate contends the county can be held liable for its own negligent failure to control Zana's use of county owned "dangerous instrumentalities." This argument is factually based on evidence that when Bistryski used Zana's personal handgun to murder Harb, it was loaded with bullets issued by the sheriff's office. Legally, the argument is based on *Restatement (Second) of Torts* § 317 (1965).

Generally, an actor has no duty so to control the conduct of a third person as to prevent him from causing physical harm to another. Restatement (Second) of Torts § 315 (1965). However, liability may arise if the actor and third person have a special relation that obligates the actor to control the third person's conduct. Restatement (Second) of Torts § 315(a). See Taggart v. State, 118 Wn.2d 195, 218-19, 822 P.2d 243 (1992) (applying the "take charge" exception in section 319 to the relationship between parole officer and parolee).

One such special relation is defined in section 317. This section, the foundation of the estate's argument, imposes a duty upon a master to control the conduct of a servant where the servant is using a chattel of the master and certain other conditions are met:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) The servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 317 (1965). Comment b to section 317 explains that the master can be liable even when the servant is using the master's chattel for his own purposes, outside the scope of his employment.

Comment c explains that where the master knows that his servants are "in the habit of misconducting themselves in a manner dangerous to others," the master may be liable for retaining the servants in employment. "There may be circumstances in which the only effective control which the master can exercise over the conduct of his servant is to discharge the servant." As an example, the comment refers to the case of a railroad company whose crews routinely threw coal off the coal cars while passing through a city in violation of company rules:

> *Retention in employment of servants known to misconduct themselves*. There may be circumstances in which the only effective control which the master can exercise over the conduct of his servant is to discharge the servant. Therefore the master may subject himself to liability under the rule stated in this Section by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others. This is true although he has without success made every other effort to prevent their misconduct by the exercise of his authority as master. Thus a railroad company which knows that the crews of its coal trains are in the habit of throwing coal from the cars as they pass along tracks laid through a city street, to the danger of travelers, is subject to liability if it retains the delinquents in its employment, although it has promulgated rules strictly forbidding such practices.

Restatement (Second) of Torts § 317 cmt. c.

The estate contends section 317 is satisfied because King County employed Zana, gave him bullets to use in his personal gun, and had the opportunity to control him, including by firing him if all else failed. The estate fails to establish the requirement that the master knew or should have known of the "necessity" for exercising such control. Restatement (Second) of Torts § 317(b)(ii). Zana had disciplinary problems during his career as a deputy, but he

was not known to make a practice of leaving his personal handgun unsecured. Zana's superiors counseled him to keep his guns in a lock box or in the trunk of his car. Zana assured them that he kept his police equipment in a room that Bistryski was unable to access. Thus, while the county knew Zana was living with an unstable roommate with a history of violent conduct, the county did not know Zana would allow the roommate to have access to his gun. Without more, the evidence is insufficient to make Zana's conduct analogous to the railroad crews discussed in comment c *Restatement (Second) of Torts* § 317.

The estate recasts this same argument as a claim of negligent supervision, citing Niece v. Elmview Group Home, 131 Wn.2d 39, 929 P.2d 420 (1997). Again, the argument assumes that Zana habitually allowed Bistryski to have access to the gun and ammunition he kept at home and that the sheriff's office knew this.

Niece recognizes *Restatement (Second) of Torts* § 317 as the basis for a theory of negligent supervision which "creates a limited duty to control an employee for the protection of third parties, even where the employee is acting outside the scope of employment." Niece, 131 Wn.2d at 51-52. In Niece, the court determined that the defendant group home owed a duty to protect its vulnerable patients from the harm of sexual assault, but the court rejected the plaintiff's additional theory that the group home was negligent in supervising the employee who committed the assault. "The record does not show that Elmview knew or should have known that Quevedo would sexually assault residents."

Niece, 131 Wn.2d at 52. Similarly, here, the record does not show that the sheriff's office knew or should have known that Zana would enable his roommate to commit murder with a loaded gun.

CAUSATION

Even if there was sufficient evidence to give rise to a claim for direct negligence on the part of the sheriff's office, the estate's case lacks proof of proximate cause.

The elements of a negligence cause of action are the existence of a duty to the plaintiff, breach of the duty, and injury to the plaintiff proximately caused by the breach. Estate of Bordon v. Dep't of Corr., 122 Wn. App. 227, 235, 95 P.3d 764 (2004), review denied, 154 Wn.2d 1003 (2005). There are two elements of proximate cause: legal causation and cause in fact. Bordon, 122 Wn. App. at 239. There is cause in fact if a plaintiff's injury would not have occurred 'but for' the defendant's negligence. Cause in fact does not exist if the connection between an act and the later injury is indirect and speculative. Bordon, 122 Wn. App. at 240.

Bistryski killed Harb with Zana's privately owned handgun. The estate's theory is that Harb would not have been murdered but for the county's retaining Zana as an employee or furnishing to Zana the bullets with which his handgun was loaded. The estate lacks evidence of cause in fact. Specifically, there is no basis upon which a trier of fact could determine that if the county had fired Zana or refused to issue him ammunition for his personal weapon, he would have ceased to keep a loaded handgun in his home.

In summary, we conclude the estate's negligence claim against King County fails for lack of the elements of duty and causation. Our disposition

makes it unnecessary to consider the county's argument that the estate's claim of direct negligence is barred by the public duty doctrine.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, C.J.

Appelwick, J.