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Wolfinger-Miller v. Chambersburg Hospital

NANCY WOLFINGER-MILLER, Plaintiff, v. THE CHAMBERSBURG HOSPITAL

and ROBERT SHUNK, Defendants
Court of Common Pleas of the 39th Judicial District of Pennsylvania,

Franklin County Branch
Civil Action - Law, No. 2001-2160, Jury Trial Demanded

Demurrer to complaint sounding in tort arising from plaintiff's removal from hospital by security guard; vicarious and direct liability; demurrer overruled

1. An employer can be vicariously liable for its employee's negligent acts where those acts are committed during the course of and within the scope of his employment; an employer's vicarious liability may extend to an employee's intentional or even criminal acts.

2. An employee's conduct is within the scope of his employment if (i) it is of the kind which the employee has been hired to perform; (ii) it occurs substantially within authorized time and space limits; (iii) it is done at least in part to serve the employer's purpose; and (iv) the employee's intentional use of force is foreseeable by the employer.

3. An employer is not responsible as a matter of law for an employee's conduct entailing the use of force which is excessive and so dangerous as to be beyond reason.

4. Where plaintiff alleges a hospital is vicariously liable for her assault and forcible removal from its facility by a security guard because she was accompanied by a dog specially trained to assist her with her physical disability, and plaintiff cites in support a newspaper article in which a hospital representative stated that the guard was acting according to hospital policy, that statement is prima facie evidence of hospital policy such that the complaint alleging vicarious liability on the part of the hospital must survive a demurrer.

5. An employer may be directly or independently liable for an employee's actions if it knew or should have known the employee was dangerous and that his employment might provide the setting for him to harm a third person; the victim must prove the employer breached a duty to protect others from the employee's actions because there was a special relationship between the victim and the employer; if there was no such relationship, the employer's duty is merely the general one imposed on all persons not to place others at risk.

6. Where plaintiff alleges a hospital is directly or independently liable for failing to educate its security guards about the right of the handicapped to be at its facility with a service dog and for hiring and retaining a guard whom it knew or should have known had violent tendencies, the question of whether the guard's conduct was foreseeable or whether the connection between the employer's mission, the employee's conduct and the victim is too tenuous to impose liability on the employer as a matter of law can be resolved only after discovery.

Appearances:

Michael J. Navitsky, Esq., *Counsel for Plaintiff*

L.C. Heim, Esq., *Counsel for Defendant Robert Shunk*

Kevin E. Osborne, Esq., *Counsel for Defendant The Chambersburg Hospital*

OPINION

Herman, J., February 4, 2002

Introduction

Before the court are the preliminary objections of defendant Chambersburg Hospital to a complaint alleging tortious conduct filed against the Hospital and defendant Robert Shunk, a security guard hired by the Hospital. The action arises out of an incident during which the defendant Shunk physically removed the plaintiff, who was accompanied by her service dog, from the Hospital's emergency department. The plaintiff claims the Hospital is vicariously liable for

Shunk's actions and is also directly liable in connection with the hiring and training of its agents/employees. Counsel for the Hospital and for the plaintiff submitted briefs and the court heard oral argument. This matter is ready for decision.[1]

Background

The Hospital's objections are in the nature of a demurrer, which is a challenge to the legal sufficiency of a claim. A demurrer should be sustained only where it is clear from the facts pled in the complaint and all reasonable inferences therefrom that no recovery is possible under any theory of law. Rutherford v. Presbyterian-University Hospital, 612 A.2d 500 (Pa.Super. 1992); Pa.R.C.P. 1028(a)(4).

The incident giving rise to this complaint occurred on February 1, 2001, in the Hospital's emergency department where the plaintiff was visiting a sick family member. She was accompanied by other family members and her service dog. The plaintiff suffers from the condition known as Lupus and requires the dog's assistance to cope with her physical disability. The dog was identified with a special collar and tag denoting its status as a service animal. According to the complaint, Shunk grabbed the plaintiff by the arm and struck her in the face and glasses while saying, "You are not a crip [cripple]. Get out!" Another guard arrived to assist Shunk at his request. The complaint alleges the plaintiff was grabbed and forcibly removed from the emergency department despite warnings from another person witnessing the incident who told Shunk the plaintiff had a right to be in the emergency area with the dog.

The plaintiff seeks damages from the Hospital and Shunk for assault and battery, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress. In addition to compensatory damages, the plaintiff seeks punitive damages based on Shunk's "brutal and violent" conduct which was alleged to be "deliberate, willful, wanton, outrageous, cruel and unusual" and constituted "reckless indifference" to her rights. (Paragraphs 6, 49, 50, 51.) The complaint alleges the Hospital is vicariously liable for Shunk's actions. The Hospital is also alleged to be directly or independently liable because it did not use proper procedures in hiring and training its security guards about the rights of the handicapped.

Discussion

Vicarious liability

The Hospital argues the complaint does not state a prima facie case of vicarious liability because Shunk was not within the scope of his employment in behaving as plaintiff alleges. Preliminarily we note the record is unclear as to whether Shunk was in fact an employee of the Hospital or was the employee of a security firm which independently contracts with the Hospital to provide security services. Since we must accept the averments of the complaint as true for the purpose of ruling on these objections, we will assume Shunk was a Hospital employee at the time of the incident.

An employer can be vicariously liable for its employee's negligent acts where those acts are committed during the course of and within the scope of his employment. Valles v. Albert Einstein Medical Center, 758 A.2d 1238 (Pa.Super. 2000), appeal granted, 771 A.2d 1287 (Pa. 2001, March 23, 2001). Under certain circumstances an employer's vicarious liability may extend to an employee's intentional or even criminal acts. An employee's conduct is within the scope of his employment if: (1) it is of the kind which the employee has been hired to perform, (2) it occurs substantially within authorized time and space limits, (3) it is done at least in part to serve the employer's purpose, and (4) the employee's intentional use of force is foreseeable by the employer. Id.

The question of whether an employee acted "within the scope of his employment" depends on a case-by-case analysis, with the jury typically deciding the parameters of that term. Costa v. Roxborough Memorial Hospital, 708 A.2d 490 (Pa.Super. 1998). However, an employer is not responsible as a matter of law for an employee's conduct entailing the use of force which is excessive and so dangerous as to be beyond reason. "[A]n assault committed by an employee upon another for personal reasons or in an outrageous manner is not actuated by an intent to perform the business of the employer and, as such, is not within the scope of employment." Id. at 493; Brezenski v. World Truck Transfer, Inc., 755 A.2d 36 (Pa.Super. 2000)(employer truck company not vicariously liable for its employee's shootings which were committed off-site, were unrelated to his employment and were not reasonably foreseeable or controllable by employer).

The plaintiff avers that Shunk was acting according to Hospital policy when he confronted her. In support she cites a newspaper article purportedly from early July 2001 featuring an interview between the Hospital's public relations officer and the Mercersburg Journal in connection with an incident involving another visitor to the Hospital who was barred from entering the emergency area with her service dog. In the article the Hospital representative is quoted as saying, "The security guard was acting in accordance with policy in place at the time," and that "this policy has been in effect since 1994."

The Hospital initially argues the article is not properly before the court as an exhibit to the plaintiff's response to the defendant's preliminary objections. It is further argued that the article should not be considered by the court because it involves a case other than the case at bar. Putting the first objection aside for the moment, the statement of the Hospital representative serves as prima facie evidence of hospital policy at this early stage in the proceedings. It is clear as to the status of service dogs. We agree however that this potential averment is not yet properly before the court. The article appears in the record as part of plaintiff's response to the preliminary objections but is not part of the complaint itself, nor does the complaint plead facts which are contained in the article. Because a demurrer is a challenge to the sufficiency of a cause of action as pled in the complaint, the court is limited to considering facts as pled in the complaint without reference to other pleadings, petitions or motions. However, rather than make this technical problem a reason for sustaining the demurrer, we will overrule the demurrer based on the above analysis of the law of vicarious liability, providing that the plaintiff amends the complaint to include appropriate averments based on the allegations in the plaintiff's response to the defendant's preliminary objections.

Citing Costa, the Hospital next argues that, assuming there is indeed a policy to exclude service dogs

accompanying handicapped persons from the emergency area, the Hospital cannot be liable as a matter of law because it could not by definition have anticipated, sanctioned or promoted the kind of outrageous conduct Shunk allegedly committed in furtherance of such a policy. We disagree Costa demands this result.

In that case a laundry worker intentionally assaulted a co-worker during a drug test ordered by their employer. The court held the employer could not be liable as a matter of law because the employer was not in control of the employee's assaultive behavior nor could the employer have anticipated his violent reaction. This approach was followed in Fitzgerald v. McCutcheon, 410 A.2d 1270 (Pa.Super. 1979) cited by Costa in which an off-duty police officer shot his friend with a non-departmental gun following a day of excessive drinking. The Fitzgerald court ruled in response to a motion requesting judgment notwithstanding the verdict. Costa was decided on a motion for summary judgment, as were Brezenski, supra and Valles, supra (a hospital was not vicariously liable as a matter of law for independent contractor-physician's failure to satisfy the requirements of informed consent). These decisions were based on a fully developed factual record, in contrast to the instant case where no discovery has taken place between the plaintiff and the Hospital about the nature of Shunk's employment and the nature of any relevant Hospital policy. Without such discovery, the court cannot determine as a matter of law whether the Hospital should have foreseen that handicapped persons using service animals might resist efforts to exclude them from certain areas and that Hospital employees and/or agents would have reason to believe they were authorized to use force to handle such situations. To sustain the demurrer as to vicarious liability and dismiss the action at this juncture would be inappropriate.

Independent liability

The complaint avers the Hospital is independently liable because it failed to educate its security employees about the right of handicapped individuals to be at the facility with their service dogs. "By way of example of this independent basis of liability, the very next day after the incident...plaintiff placed a telephone call to the Chambersburg Hospital and spoke to its Chief Executive Officer, who told Plaintiff that she could not return to the hospital and that he fully supported the conduct of his security guards." (Paragraph 20.) Count IV of the complaint avers the Hospital did not instruct its security guards as to the rights of the physically challenged and did not know those rights itself; that it retained security guards which it knew or should have known had violent or otherwise inappropriate propensities; and that it knew or should have known Shunk had propensities to act inappropriately and should have either trained, retrained or discharged him before the incident took place. (Paragraphs 43, 44, 45.)

An employer may be held negligent if it knew or should have known an employee was dangerous and that his employment might provide the setting for him to harm a third person. Hutchison v. Luddy, 742 A.2d 1052 (Pa.1999) (church liable for priest's sexual crimes where it placed him in situations with young children despite knowing he had pedophilic tendencies, because the abuse was foreseeable); section 317 Restatement (Second) of Torts. An employer has a general duty to exercise reasonable care in selecting, supervising and controlling employees so as to avoid harm to third persons. Brezenski, supra; R.A. v. First Church of Christ, 748 A.2d 692 (Pa.Super. 2000). The victim must prove the employer breached a duty to protect others from the employee's actions because there was a special relationship between the victim and the employer. Brezenski, supra. If there was no such relationship, the employer's duty remains the general one imposed on all persons not to place others at risk. This is again a question of foreseeability and whether the connection between the employer's mission, the employee's conduct and the victim is too tenuous to impose liability on the employer for not controlling the employee.

While there can be no liability for extreme conduct on the part of an employee which is uncontrollable and unforeseeable by the employer, this action cannot be dismissed at this juncture for the same reason that we cannot dismiss claim of vicarious liability. At this time there is only a prima facie indication of exactly what the Hospital policy was regarding the use of service animals by handicapped persons and how such persons entering the emergency department were to be handled by Hospital agents or employees. Without further pleadings and discovery, we cannot determine as a matter of law whether the kind of encounter which the plaintiff alleges occurred on February 1, 2001, was foreseeable or controllable by the Hospital, or whether the Hospital failed to instruct its agents or employees about the rights of the handicapped such that it should be held independently liable for this incident.

Motion to strike

The Hospital points out that the complaint as drafted does not set out a separate count against the Hospital for independent liability and does not contain a separate demand for relief on that ground. Pa.R.C.P. 1020(a). "The plaintiff may state in the complaint more than one cause of action against the same defendant heretofore asserted in assumpsit or trespass. Each cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief." The plaintiff does not dispute Count IV includes allegations not only of vicarious liability but also of independent liability and indicated to the court at argument a willingness to amend the complaint accordingly. The court will therefore sustain this objection and direct the plaintiff to file an amended complaint along these lines.

Punitive damages

Paragraph 51 of the complaint avers the Hospital "acquiesced and encouraged the behavior of its security guard, Defendant Shunk, and the...Hospital is therefore likewise answerable for punitive damages to Plaintiff." The Hospital objects to this demand for punitive damages as to both the vicarious and independent liability claims. Its position is that because Shunk acted beyond the scope of his employment, the Hospital could not possibly have encouraged or acquiesced in his behavior. This position rests on the Hospital's previous argument with respect to the vicarious liability claim and must be rejected for the same reason we overruled that objection. Once the parties conduct discovery as to the existence and nature of any relevant Hospital policy and the nature of Shunk's employment, the court will be in a position to decide whether the evidence is sufficient to warrant a jury charge on punitive damages. The court will overrule this objection.

ORDER OF COURT

Now this 4th day of February 2002, the court overrules the preliminary objections in the nature of a demurrer filed by defendant Chambersburg Hospital to the plaintiff's claims of vicarious liability and independent liability on the condition that the plaintiff file an amended complaint with appropriate averments with regard to the allegations in paragraph 9 of plaintiff's response to defendant's preliminary objections. The court sustains without prejudice the preliminary objection in the nature of a motion to strike the complaint under Pa.R.C.P. 1020(a) and directs the plaintiff to file an amended complaint no later than twenty (20) days from receipt of this Order. The court overrules the preliminary objection in the nature of motion to strike the claim for punitive damages.

ınt Shunk filed an answer to the complaint and did not participate in argument.