STATE OF MICHIGAN

IN THE SUPREME COURT

TARA HAMED,

Plaintiff-Appellee,

v.

Supreme Court No. 139505
Court of Appeals No. 278017
Wayne County Circuit Court
Case No. 03-327525-NZ
Hon. Michael Sapala

WAYNE COUNTY, THE WAYNE COUNTY SHERIFF'S DEPARTMENT, THE WAYNE COUNTY SHERIFF, SGT KENNETH DAWWISH (*Dismissed*), CPL NETTIE JACKSON (*Dismissed*),

Defendant-Appellants,

and

REGINALD JOHNSON

Defendant (*In Pro Per*).

BRIEF ON APPEAL FOR AMICUS CURIAE MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY ON BEHALF OF DEFENDANT-APPELLANTS

PROOF OF SERVICE

MELLON PRIES, P.C.

BY: JAMES T. MELLON (P23876)
DAVID A. KOWALSKI (P71179)
Attorneys for Amicus MMRMA
2150 Butterfield Drive, Suite 100
Troy, MI 48084
(248) 649-1330

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Mellon Pries
2150 Butterfield Dr.
Suite 100
Troy, MI 48084

248-649-1330

GARY P. SUPANICH (P45547)
Gary P. Supanich PLLC
Attorney for Plaintiff-Appellee
320 Miller Ave., Ste. 126
Ann Arbor, MI 48103
(734) 276-6561

ELMER ROLLER (P23592)
Elmer L. Roller, P.C.
Attorney for Plaintiff-Appellee
1760 South Telegraph Rd., Ste. 300
Bloomfield Hills, MI 48302
(248) 335-5000

BRIAN LAVAN (P16449)
Brian Lavan & Associates PC
Attorney for Plaintiff-Appellee
7990 W. Grand River, Ste. C
Brighton, MI 48114
(810) 227-1511

REGINALD JOHNSON
In Pro Per
25166 Friar Lane
Southfield, MI 48033

MARK J. ZAUSMER (P31721)
CARSON J. TUCKER (P62209)
Zausmer, Kaufman, August,
Caldwell & Taylor, PC
Attorneys for Defendant-Appellants
Wayne Cty. & Wayne County Sheriff
31700 Middlebelt Rd., Ste. 150
Farmington Hills, MI 48334
(248) 851-4111

AARON THOMAS (P55114)
Assistant Corporation Counsel
Attorney for Defendant-Appellants
Wayne Cty. & Wayne County Sheriff
Wayne County Corporation Counsel
Wayne County Building
600 Randolf, Ste. 253
Detroit, MI 48226
(313) 224-0552

JAMES T. MELLON (P23876)
DAVID A. KOWALSKI (P71179)
Mellon Pries, P.C.
Attorneys for Amicus Curiae MMRMA
2150 Butterfield Dr., Ste. 100
Troy, MI 48084
(248) 649-1330

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STATEMENT OF THE BASIS OF JURISDICTION

Michigan Municipal Risk Management Authority ("MMRMA") concurs in the Statement of Basis of Jurisdiction by Defendant-Appellants Wayne County, the Wayne County Sheriff's Department and the Wayne County Sheriff (collectively, "Wayne County Defendants"). (**Brief on Appeal for Defendants/Appellants** ("Wayne County Brief"), pp. ix-x).

Mellon Pries
2150 Butterfield Dr.
Suite 100
Troy, MI 48084

248-649-1330

STATEMENT OF THE QUESTIONS PRESENTED

I. Whether Wayne County and the Wayne County Sheriff's Department may be held liable to Ms. Hamed for quid pro quo sexual harassment under MCL 37.2103(i)?

MMRMA answers: No.

Wayne County Defendants answer: No.

Ms. Hamed answers: Yes.

Circuit Court and Court of Appeals answer: Yes.

II. Whether Ms. Hamed's incarceration in the Wayne County Jail is a public service within the meaning of MCL 37.2301(b)?

MMRMA answers: No.

Wayne County Defendants answer: No.

Ms. Hamed answers: Yes.

Circuit Court and Court of Appeals answer: Yes.

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2150 Butterfield Dr.
Suite 100
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MATERIAL FACTUAL AND PROCEDURAL HISTORY

MMRMA concurs in the factual and procedural history as stated by Wayne County, and incorporates those statements as if fully set forth herein. (**Wayne County Brief**, pp. 4-10). MMRMA

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Suite 100
Troy, MI 48084

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STANDARD OF REVIEW

The Wayne County Circuit Court granted Wayne County Summary Disposition pursuant to MCR 2.116(c)(10). A trial court's decision on a motion for summary disposition is reviewed *de novo*. *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009). A Motion for Summary Disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). On a motion for summary disposition, the moving party, has the burden of establishing, through admissible evidence, that there is no genuine issue of material fact. MCR 2.116(C)(10); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A court looks beyond the pleadings to "'affidavits, pleadings, depositions, admissions, and documentary evidence filed.'" *Smith v Globe Life Ins, Inc*, 460 Mich 446, 454; 597 NW2d 28 (1999) (quoting *Quinto*, 451 Mich at 362-63). A "court is not permitted ... to determine facts on a motion for summary judgment." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Rather, the Court is limited to reviewing the record evidence submitted with the motion and in opposition, and the reasonable inferences derived therefrom. *Id.* The party opposing the motion must put forth "substantively admissible evidence" in opposition and may not rely on "the mere possibility that the claim might be supported by evidence produced at trial." *Maiden*, 461 Mich at 121. Where no genuine issue of material fact exists, the moving party is entitled to judgment as a matter of law. *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007).

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2150 Butterfield Dr.
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INTRODUCTION

By way of the Order entered June 23, 2010, this Court granted leave to appeal, but limited the issues to whether 1.) Wayne County and the Wayne County Sheriff's Department may be held liable to Ms. Hamed for quid pro quo sexual harassment under MCL 37.2103(i); 2.) Ms. Hamed's incarceration in the Wayne County Jail is a public service within the meaning of MCL 37.2301(b); and 3.) the trial court erred in permitting Ms. Hamed to amend her complaint to allege violations of the Michigan Civil Rights Act. MMRMA submits this Brief of Amicus Curiae in full support of the position of Wayne County that a county cannot be held liable for the sexual assault by a deputy sheriff upon a person detained in a county correctional facility pursuant either to fundamental, common law, principles of vicarious liability or Elliott-Larsen Civil Rights Act (hereafter, "ELCRA"), MCL 37.2101, *et seq.* Furthermore, the ELCRA is not intended to include within its ambit county detention facilities as places of "public service" as it pertains to persons being detained in such facilities. MMRMA does not address the third issue regarding the propriety of permitting Ms. Hamed to amend her complaint in this matter.

ARGUMENT

I. Neither Wayne County Nor the Wayne County Sheriff's Department May Be Liable to Ms. Hamed for Quid Pro Quo Sexual Harassment.

Ms. Hamed alleges quid pro quo sexual harassment. (**Appellants' Index**, pp. 204a-211a. The only defendant alleged to have committed any acts constituting quid pro quo sexual harassment is Reginald Johnson, who was alleged to have been a Wayne County Deputy Sheriff at the time. (***Id.***). Thus, if Wayne County is to be held liable, then it must based on a theory of vicarious liability. It is worth noting that the federal analog to the ELCRA, 42 USC §1983, does not permit such liability. "[V]icarious liability is inapplicable to *Bivens* and §§ 1983 suits, [and] a plaintiff must plead that each

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2150 Butterfield Dr.
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Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, --- U.S. ---; 129 S.Ct. 1937, 1948 (2009). Indeed, while a municipality may qualify as a "person" pursuant to federal civil rights law, the United States Supreme Court has explicitly held: "In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor - or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v Dept of Soc Servs of City of New York*, 436 US 658, 692 (1978).

A. Principles of Agency Law Dictate that an Employer Will Not Be Held Responsible for an Employee's Sexual Assault.

Ms. Hamed correctly acknowledges that "common-law agency principles apply to *quid pro quo* cases brought under the [ELCRA]." (**Hamed Brief**, p. 14); *Chambers v Trettco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000) ("Whichever category of sexual harassment is at issue, it is always necessary to determine the extent of the employer's vicarious liability when harassment is committed by an agent. Because the Civil Rights Act expressly defines 'employer' to include agents, we rely on common-law agency principles in determining when an employer is liable for sexual harassment committed by its employees.") (emphasis added). However, to sustain her claim and allow an employer to be held liable for a sexual assault committed by an employee, far from relying on agency law, Ms. Hamed would have this Court do the opposite and reverse long-standing precedent.

This State has great respect for the common law. Const 1963, art 2, § 7. *Respondeat superior*, is a common law doctrine of vicarious liability whereby a master is responsible to third parties "'for the wrongful acts of his servant committed while performing some duty within the scope of his employment.'" *Rogers v JB Hunt Trans, Inc*, 466 Mich 645, 650-51; 649 NW2d 23 (2002) (quoting *Murphy v Kuhartz*, 244 Mich

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2150 Butterfield Dr.
Suite 100
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54, 56; 221 NW 143 (1928)). The imposition of liability is a policy choice, not an allocation of actual fault:

> Under the doctrine of vicarious liability, an employer is held liable to a third party even when the employer is free from all fault. The doctrine is justified as a deliberate allocation of risk. The employer, having engaged in a business and seeking to profit from it, is better able to foresee harm caused by the negligence of his employees and to insure against it than the innocent third party. (Prosser & Keeton, Torts sec. 69, at 499-501 [5th ed, 1984].) Thus, the employer is held liable as a matter of policy, but he is not a wrongdoer.

Theophelis v Lansing Gen Hosp, 430 Mich 473, 490; 424 NW2d 478 (1988) (quoting *Bristow v Griffitts Const Co*, 140 Ill App 3d 191, 193-94; 488 NE2d 332 (1986)) (emphasis added). "it is fair and reasonable to hold an employer liable for the harmful actions of its employee." *Zsigo v Hurley Med Ctr*, 475 Mich 215, 231; 716 NW2d 220 (2006) (quoting *Doe v Forest*, 176 Vt 476, 506; 853 A2d 48 (2004) (Skoglund, J, dissenting, joined by Amestoy, CJ)). This Court has even stated that these principles apply in the case of *quid pro quo* harassment:

> under current Michigan law, whether analyzing quid pro quo harassment or hostile environment harassment, the question is always whether it can be fairly said that the employer committed the violation-either directly or through an agent. The fact that the answer to that question may differ depending on whether the harassment is of the quid pro quo or hostile environment type is not a result of arbitrary rulemaking, but, rather, <u>is firmly rooted in traditional agency principles</u>.

Chambers, 463 Mich at 312 (emphasis added).

However, an employer will not be held liable for every act of its employee. As noted above, to bring the policy considerations of *respondeat superior* into play, an employee's act must occur in 1.) performance of a duty for the employer 2.) which is in his scope of employment. The employer cannot be held liable for an act committed by the employee, where the act is beyond the scope of their employment. *Borsuk v.*

Mellon Pries
2150 Butterfield Dr.
Suite 100
Troy, MI 48084

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Wheeler, 133 Mich App 403, 410; 349 NW2d 522 (1984). An employer has no liability where the employee's tortious act is committed while the employee is working for the employer but the act is outside her authority. *Green v. Shell Oil Co*, 181 Mich App 439, 446; 450 NW2d 50 (1989). There is no vicarious liability if the employee steps aside from her employment to gratify some personal animosity or to accomplish some purpose of her own. *Id.* at 446-447; *Burch v A&G Associates, Inc*, 122 Mich App 798, 804; 333 NW2d 140 (1983) (quoting *Martin v Jones*, 302 Mich 355, 358; 4 NW2d 686 (1942)). In short, "an employer is not liable for the wanton, wilful, and malicious acts of an employee not authorized or ratified," because those acts lie outside the scope of the employment. *Davidson v Chinese Republic Restaurant Co*, 201 Mich 389, 397; 167 NW 967 (1918); *see also*, *Ducre v Sparrow-Kroll Lumber Co*, 168 Mich 49, 52; 133 NW 938 (1911).

At issue here is a sexual assault. "Intentional and reckless torts are generally held to be beyond the scope of employment." *Borsuk*, 133 Mich App at 410. "[A]n employer is not liable for 'torts intentionally or recklessly committed by an employee beyond the scope of his master's business.'" *New Freedom Mortg Corp v Globe Mortg Corp*, 281 Mich App 63, 79; 761 NW2d 832 (2008) (quoting *Rogers*, 466 Mich at 651. "Assault and battery are intentional acts." *Smorch v Auto Club Ins Co*, 179 Mich App 125, 129; 445 NW2d 192 (1989). Furthermore, "[w]hen a purported agent is shown to have been acting outside the scope of the law, it is presumed that he was not acting within the scope of his duties for the purported principal." *Rohe Scientific Corp v Nat'l Bank of Detroit*, 133 Mich App 462, 469-70; 350 NW2d 280 (1984), *mod on other grounds on reh* 135 Mich.App. 777, 355 N.W.2d 883 (1984). "Employers generally do not assume their employees are potential criminals, nor should they." *Brown v Brown*,

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2150 Butterfield Dr.
Suite 100
Troy, MI 48084

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478 Mich 545, 554; 739 NW2d 313 (2007). In fact, the opposite presumption is warranted: "an employer can assume that its employees will obey our criminal laws." *Id.* at 555. "Michigan law does not subscribe to a theory creating vicarious liability in a principal for the commission of an unknown criminal act by an agent aided in that act through the agency relationship." *Doe v Shapiro*, unpublished opinion per curiam of the Court of Appeals, issued Mar 4, 2008 (Docket Nos 273950, 273962) (**Exhibit A**, p. 10). In other words, there exists a "rule exempting vicarious liability in the principal for the unknown criminal acts of its agent." *Id.*

In fact, this Court has recently addressed the exact question of whether a sexual assault by an employee can fall within the scope of employment to allow for the imposition of vicarious liability on an employer. In plain terms, this Court stated that an employee "was clearly not acting within the scope of his employment when he engaged in acts of sexual misconduct with plaintiff." *Zsigo*, 475 Mich at 231.

Ms. Hamed asks this Court to adopt the what she claims is a conclusion of the "concurring opinion in *Zsigo*" that *Champion v Nationwide Security, Inc*, 450 Mich 702; 545 NW2d 596 (1996), which purportedly adopted an exception contained in the Restatement Agency 2d, § 219(2)(d).[1] (**Hamed Brief**, p. 9). *Zsigo*'s majority opinion was clear on the state of Restatement Agency 2d, § 219(2)(d) in Michigan jurisprudence:

> [T]he reference to § 219(2)(d) in *Champion*, *supra*, was made only in passing and on the basis of the very distinct facts of that civil rights matter. We did not, by that reference, adopt § 219(2)(d). The Court of Appeals erred in finding that this Court affirmatively adopted the "aided by the agency relationship"

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2150 Butterfield Dr.
Suite 100
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[1] That section of the Restatement says: "A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless ... the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."

exception to liability under the respondeat superior doctrine set forth in Restatement Agency, 2d, § 219(2).

Zsigo, 475 Mich at 223-24 (emphasis added). Thus, Ms. Hamed's contention that this Court has implicitly adopted Section 219(2)(d) of the Restatement in *Champion*, has already been rejected. (**Hamed Brief**, p. 28). Justice Young's concurrence in *Zsigo* stated: "I find it hard to square *Champion* with any conventional notion of agency, and it stands as an isolated, inexplicable exception in our Michigan Supreme Court jurisprudence." *Zsigo*, 475 Mich at 232 (Young, J concurring). MMRMA wholeheartedly agrees that this Court should adopt Justice Young's concurrence in *Zsigo*. In actuality, Ms. Hamed wants this Court to overrule *Zsigo*, and adopt that opinion's dissent, but she hides her true intent by incorrectly claiming that the concurrence in *Zsigo* stands for the proposition she advances.

Numerous panels of the Court of Appeals agree with the conclusions of *Zsigo*: "the criminal actions of an employee [generally] are outside of the scope of employment." *Kendrick v Ritz-Carlton Hotel Co, LLC*, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2006 (Docket No 256696) (**Exhibit B**, p. 6) (finding a sexual assault outside the scope of employment); *Bryant v Brannen*, 180 Mich App 87, 98, 103; 446 NW2d 847 (1989)](finding that whether an employee is acting within the scope of his employment"may be decided as a matter of law where it is clear that the employee was acting to accomplish some purpose of his own," and concluding serious criminal acts are outside the scope of employment); *Bradley v Stevens*, 329 Mich 556, 562-63; 46 NW2d 382 (1951) (finding gas station employee not acting within scope of employment while sexually attacking customer); *Cawood v Rainbow Rehabilitation Centers, Inc*, 269 Mich App 116, 119; 711 NW2d 754 (2005) (concluding that a sexual assault lies outside the scope of employment). Further, it has been held

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that a sexual assault by a teacher on a student - one person in a position of authority over another, similar to the present case - was "clearly outside the scope of ... employment." *Bozarth v. Harper Creek Bd of Ed*, 94 Mich App 351, 353; 288 NW2d 424 (1979); *Daugherty v Legros*, unpublished opinion per curiam of the Court of Appeals, issued April 25,2000 (Docket No 208127) (**Exhibit C**, p. 3) ("The trial court correctly ruled that ... the [sexual] assaults were outside the scope of his employment").

Even the United States Court of Appeals for the Sixth Circuit has interpreted the clear command of *Zsigo* in *Powell-Lee v HCR Manor Care*, 231 Fed Appx 438, 443 (2007) (unpublished). The Sixth Circuit considered the case of a claim alleging that an employee exposed himself to another employee on the job. *Id.* at 439. The Sixth Circuit wasted little time concluding, pursuant to *Zsigo*, that in exposing himself to another, the employee "was clearly acting outside the scope of his employer's business." *Id.* at 443. If an act such as indecent exposure clearly lies outside the scope of employment, then surely a more egregious act - a sexual assault - lies outside as well.

Numerous decisions from courts of sister states agree with our Supreme Court's conclusion that a sexual assault is outside the scope of employment. *Deloney v Bd of Educ of Thornton* Twp, 281 Ill App 3d 775, 783-84; 666 NE2d 792, 797-98 (1996) ("generally, acts of sexual assault are outside the scope of employment."); *Horace Mann Ins Co v Analisa N*, 214 Cal App 3d 850, 856; 263 Cal Rptr 61, 64 (1989) (no duty to indemnify for sexual assault by teacher on a student, as that act lies outside the scope of employment, and is not "an activity which is reasonably related to the goal [of the employer]."); *Medlin v Bass*, 327 NC 587, 594; 398 SE2d 460, 464 (1990) (concluding that a sexual assault is an act "so clearly outside the scope of employment that

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summary judgment is proper."); *Smith v American Express Travel Related Servs Co*, 179 Ariz 131, 136; 876 P2d 1166, 1171 (Ariz Ct App1994) (as a matter of law, sexual assault and harassment is outside the scope of employment); *Bratton v Calkins*, 73 Wash App 492, 500-01; 870 P2d 981, 986 (1994) (sexual conduct with a student outside teacher's scope of employment); *Tall v Bd of School Comm'rs of Baltimore City*, 120 Md App 236, 259; 706 A2d 659, 671 (1998) (sexual assault by teacher on student not within scope of employment); *Sanborn v Methodist Behavioral Resources P'ship*, 866 So2d 299, 305 (La Ct App 2004) (sexual assault by substance abuse counselor outside scope of employment); *NX v Cabrini Med Ctr*, 97 NY2d 247, 251; 765 NE2d 844, 847 (2002) ("A sexual assault perpetrated by a hospital employee is not in furtherance of hospital business and is a clear departure from the scope of employment, having been committed for wholly personal motives."); *Doe v Swift*, 570 So2d 1209, 1212 (Ala 1990) (as between a state-employed doctor and his patient, "[t]he sexual assault was not committed in the line and scope of his employment"); *Porter v Harshfield*, 329 Ark 130, 137; 948 Sw2d 83, 86 (1997) (radiology technician "was not, by any stretch of the imagination, acting within the scope of his duties" when he sexually assaulted patient); *Wood v Safeway, Inc*, 121 Nev 724, 739; 121 P3d 1026 (2005) ("sexual assault ... was an independent venture outside the course and scope of his employment."); *Mackey v UP Enterprises, Inc*, 935 SW2d 446, 445 (Tex App 1996) ("no connection" between sexual assault and scope of employment).

In the context of members of law enforcement and their detainees/those in their charge, many courts conclude the same rule applies. *Gambling v Cornish*, 426 FSupp 1153, 1154 (ND Ill 1977) (police officers not acting within scope of employment as to alleged sexual assault); *Lola M v City of Milwaukee*, 252 Wis2d 768; 642 NW2d 646

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(Wis Ct App 2002) (unpublished) (**Exhibit D**) (police officer not within scope of employment while committing sexual assault); *Doe v South Carolina State Budget and Control Bd*, 329 SC 214, 220; 494 SE2d 469, 472 (SC Ct App 1997) (a police officer's "'sex for freedom' deals grossly exceeded the scope of his official duties" where he allowed suspected drunk drivers to go free in exchange for sex); *JH by and through DH v West Valley City*, 840 P2d 115, 123 (Utah 1992) ("the molestations committed by [the officer] were clearly outside the scope of his employment."); *Wolfe v Anne Arundel County*, 374 Md 20, 35-36; 821 A2d 52, 60-61 (2003) (police officer was not acting within scope of employment when he raped driver pulled over for traffic stop); *Bates v United States*, 701 F2d 737, 741-42 (8th Cir 1983) (military policeman who pulled over a vehicle was not acting within scope of employment when he raped vehicle occupants); *City of Green Cove Springs v Donaldson*, 348 F2d 197, 203 (5th Cir 1965) (police officer who sexually assaulted woman he had detained "stepped aside from his employment to accomplish his own, rather than the City's purpose"); *McLaren v Imperial Cas & Indem Co*, 767 FSupp 1364, 1371 (ND Tex 1991), *aff'd* 968 F2d 17 (5th Cir1992) (acts of sexual assault "were not in the furtherance of the business of City of Bedford or for the accomplishment of the object for which he was employed, but, instead, they were committed in the furtherance and gratification of personal desires and impulses of [the Officer]. From those conclusions there naturally follows the conclusion that the illegal [Officer]-McLaren encounter was not an act or failure to act on the part of [the Officer] 'within the scope of his employment or official duties[.]'").

Clearly, pursuant to common law agency principles, an employer will not be liable for an employee's sexual assault, as such an action is intentional, reckless and/or

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criminal, and carried out to satisfy some personal gratification for the employee, not to further any business of the employer.

B. Common Law Abrogation Must Be Uneqivocal.

"[T]he Legislature is deemed to act with an understanding of common law in existence before the legislation was enacted." *Nation v WDE Elec Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). A statute will not be "construed to abrogate established common-law principles by implication." *Bak v Citizens Ins Co of America*, 199 Mich App 730, 738; 503 NW2d 94 (1993). It is true:

> The Legislature has the authority to abrogate the common law. *Rusinek v. Schultz, Snyder & Steele Lumber Co.*, 411 Mich. 502, 507-508, 309 N.W.2d 163 (1981). When it does so, it should speak in no uncertain terms. *Marquis v. Hartford Accident & Indemnity (After Remand)*, 444 Mich. 638, 652 n. 17, 513 N.W.2d 799 (1994), quoting *Bandfield v. Bandfield*, 117 Mich. 80, 82, 75 N.W. 287 (1898).

Hoerstman Gen Contracting, Inc v Hahn, 474 Mich 66, 74; 711 NW2d 340 (2006). Courts should not be left to construction to sustain such bold innovations." *Marquis v Hartford Acc & Indem*, 444 Mich 638, 652 n17; 513 NW2d 799 (1994). Indeed, these principles have been reconfirmed by this Court very recently:

> The common law remains in force until modified. *Wold Architects & Engineers v. Strat*, 474 Mich. 223, 233, 713 N.W.2d 750 (2006). The abrogative effect of a statutory scheme is a question of legislative intent, and "legislative amendment of the common law is not lightly presumed." *Id.* Rather, the Legislature "should speak in no uncertain terms" when it exercises its authority to modify the common law. [*Hoerstman*, 474 Mich at 74]. Additionally, "[t]he Legislature is presumed to know of the existence of the common law when it acts." *Wold Architects*, 474 Mich. at 234, 713 N.W.2d 750.

Dawe v Dr Reuven Bar-Levav & Assocs, PC, 485 Mich 20, 28; 780 NW2d 272 (2010) (emphasis added). Where the Legislature wishes to abolish well-settled common law

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principles, it need do so "in more explicit language." *Ross v Consumers Power Co*, 420 Mich 567, 614; 363 NW2d 641 (1984).

Having established that the common law prevents an employer being liable for a sexual assault committed by an employee, the question becomes whether the Legislature has "in no uncertain terms" chosen to change the common law. *Quid pro quo* sexual harassment is a product of statute:

> Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> (i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
>
> (ii) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education, or housing.

MCL 37.2103(i). Clearly, this statute did not completely displace the common law, as this Court has stated that common law agency principles control an employer's liability for acts of its employee. *Chambers*, 463 Mich at 311. There is no indication in the language used that the Legislature wanted to change the common law as to an employee's intentional, reckless and/or criminal act. The definition of "Employer" in the ELCRA states: "'Employer' means a person who has 1 or more employees, and includes an agent of that person." MCL 37.2201(a). The Legislature's use of the word "agent" without further qualification evidences an intent to retain the whole of the common law regarding agency principles.

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Since at least 1918, this Court has held: "liability of the master for wanton and unprovoked assault made by its salesman clerk upon plaintiff was denied, under an application of the general rule that an employer is not liable for wanton, willful, and malicious acts of an employee not authorized or ratified." *Davidson*, 201 Mich at 396. Furthermore, since at least 1923, this Court has held that "where the servant does a willful or malicious act while engaged in his master's work, but outside of his authority, as where he steps aside from his employment to gratify some personal animosity or to accomplish some purpose of his own, the master is generally not liable." *Stone v Sinclair Refining Co*, 225 Mich 344, 349; 196 NW 339 (1923) (internal quotation omitted). In the face of such long-standing precedent, if the Legislature wanted to create *respondeat superior* liability on the part of the employer for a sexual assault committed by an employee, it was incumbent upon the Legislature to make plain that it was modifying the common law. The Legislature has not made clear that it intended to modify the common law.

The Court of Appeals has recently held:

> [S]tatutes in derogation of the common law are narrowly construed. *Rusinek v. Schultz, Snyder & Steele Lumber Co.*, 411 Mich. 502, 507-508, 309 N.W.2d 163 (1981). And well-settled common-law principles are not to be abolished by implication. *Walters v. Leech*, 279 Mich.App. 707, 710, 761 N.W.2d 143 (2008).
>
> [* * *]
>
> [A] well-settled common-law principle, such as the doctrine of vicarious liability, cannot be abolished by implication. And there is no language in the statute that expressly abolishes the doctrine.
>
> [* * *]
>
> A statute must not be construed to abrogate established common-law principles by implication. [*Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 507-08; 309 NW2d

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> 163 (1981)]. Thus, we have a line of Michigan cases that all conclude that the common law should not be abrogated by statute unless it clearly appears that was the legislative intent.

Lee v Detroit Med Ctr, 285 Mich App 51, 66-67; 775 NW2d 326 (2009). "In other words, '[w]here there is doubt regarding the meaning of such a statute, it is to be given the effect which makes the least rather than the most change in the common law.'" *Nation*, 454 Mich at 494 (quoting *Energetics, Ltd v Whitmill*, 442 Mich 38, 51; 497 NW2d 497 (1993).

As there is no clear intent on the part of the legislature to change the common law as it pertains to employer liability for the intentional, reckless and/or criminal acts of an employee, the traditional common law rule remains in place: An employer cannot be held liable for sexual assault committed by an employee.

C. The Michigan Constitution of 1963 Prohibits a County or County Sheriff's Department from Being Liable for the Acts of a County Sheriff or Deputy Sheriff.

Ms. Hamed contends that the entirety of the ELCRA is compelled by this State's Constitution. (**Hamed Brief**, p. 12).

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

Const 1963, art 1, § 2. The Equal Protection Clause of our Constitution requires only that the Legislature enact legislation to prevent discrimination based on "religion, race, color or national origin," none of which are at issue here. The alleged discrimination involved in this case as based on sex. That the Legislature chose to expand the protections required by the Constitution does not make those extra protections

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constitutionally mandated. The ELCRA, not the Michigan Constitution of 1963, controls alleged instances of discrimination based on sex.

County immunity, however, derives not from statute but from the Michigan Constitution itself. Counties are granted immunity from liability resulting from the acts of a County Sheriff: "The county shall never be responsible for [the sheriff's] acts, except that the board of supervisors may protect him against claims by prisoners for unintentional injuries received while in his custody." Const 1963, art 7, § 6. To the extent ELCRA provisions dealing with discrimination based on anything other than the constitutionally-prohibited "religion, race, color or national origin" could be read to conflict with explicit commands of the Michigan Constitution of 1963, the statute must yield to the Constitution.

The Court of Appeals considered the case of a plaintiff allegedly struck and injured by a deputy sheriff, while in the deputy's custody. *Bayer v Almstadt*, 29 Mich App 171, 173; 185 NW2d 40 (1970). The Court of Appeals first concluded that, pursuant to MCL 51.70, "the legislature clearly expressed its intent that under no circumstances should a sheriff be responsible for the actions of any deputy." *Id.* at 174. MCL 51.70 states that "[a] sheriff shall not be responsible for the acts, defaults, and misconduct in office of a deputy sheriff." Just as MCL 51.70 grants unequivocal immunity to a sheriff for the acts of his/her deputies, "Const.1963, art. 7, s 6 relieves a county from responsibility under the circumstances here alleged." *Bayer*, 29 Mich App at 175. Even the dissent in *Bayer* noted, "The Michigan Constitution states that 'the county shall never be responsible for his (the sheriff's) acts * * *.' Const.1963, art. 7, s 6. Clearly, the county of Macomb is within the protection of the stated constitutional provision and is immune from liability in the present case." *Bayer*, 29 Mich App at 180.

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Therefore, the Court of Appeals was unanimous in its finding regarding county non-liability for the actions of deputy sheriffs.

Ms. Hamed claims that *Bayer* has been "decisively repudiated" by *Graves v Wayne County*, 124 Mich App 36; 333 NW2d 740 (1983). (**Hamed Brief**, p. 20). Numerous courts disagree with Ms. Hamed's characterization. The decision upon which *Graves* relies upon, *Lockaby v Wayne County*, 406 Mich 65, 77; 276 NW2d 1 (1979) is only a plurality decision of this Court. Plurality opinions are not binding upon subsequent courts. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 58; 664 NW2d 776 (2003).

In a 1986 decision, three years after Ms. Hamed claims *Bayer* was "decisively repudiated," our Court of Appeals cited to *Bayer* and concluded that a sheriff's department, could not be held liable for the actions of a deputy. *Hill v City of Saginaw*, 155 Mich App 161, 172; 399 NW2d 398 (1986). Further, five years after the alleged "repudiation," the Court of Appeals again cited to *Bayer* in concluding:

> Where a plaintiff alleges that a governmental agency is vicariously liable for the torts of its officers, employees or agents, this liability is premised on the **708 employer-employee or principal-agent relationship which exists between the entity and the individual tortfeasor. *Ross v. Consumers Power Co. (On Rehearing)*, 420 Mich. 567, 363 N.W.2d 641 (1984). Generally, liability under respondeat superior can be imposed only where the individual tortfeasor acted during the course of his employment and within the scope of his authority. If either of these conditions is not met, a governmental entity cannot be held vicariously liable. *Ross*, *supra*. However, the doctrine of respondeat superior does not apply to make a sheriff liable for the acts of his deputies. *Bayer v. Macomb Co. Sheriff*, 29 Mich.App. 171, 174, 185 N.W.2d 40 (1970); M.C.L. § 51.70; M.S.A. § 5.863. Neither can vicarious liability be imposed, as a matter of law, on the county sheriff's department for the acts of a deputy. *Bayer*, *supra*, at p. 175, 185 N.W.2d 40; Const. 1963, art. 7, § 6.

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Portice v Ostego County Sheriff's Dept., 169 Mich App 563, 565-66; 426 NW2d 706 (1988). Even the most recent update of Michigan Civil Jurisprudence (November 2010) cites to *Bayer*, and concludes:

> A county is never responsible for a sheriff's acts, except the county board of commissioners may protect the sheriff against claims by prisoners for unintentional injuries received while in his or her custody. Thus, the sheriff's department, as an agency of the county, is excluded from liability for alleged assault and battery committed on a prisoner by a deputy sheriff.

7 Mich Civ Jur Counties §180 (**Exhibit E**) (emphasis added). In fact, the United States District Court for the Western District of Michigan continues to cite to *Bayer* as good law standing for the proposition that a county is not responsible for the actions of a deputy sheriff:

> In *Bayer v. Macomb County Sheriff's Department*, 29 Mich.App. 171, 185 N.W.2d 40 (1970), the Michigan Court of Appeals summarily determined that as a county agency, a sheriff department could not be liable for the actions of a county sheriff or his deputies. *Id.* at 175, 185 N.W.2d 40 (citing MICH. CONST. 1963 art. VII, § 6, which provides that "[t]he county shall never be responsible for [a sheriff's] acts ...."). Although non-binding authority, *see Garden City Osteopathic Hosp. v. HBE Corp.*, 55 F.3d 1126, 1130 (6th Cir.1995), *Bayer* has gained some currency in this district.

Telfor v Wittkopp, unpublished opinion of the USDC WD Mich, issued December 7, 2005 (Enslen, J) (**Exhibit F**, p. 5). Clearly, *Bayer* has not been repudiated.

"There shall be elected for four-year terms in each organized county a sheriff, a county clerk, a county treasurer, a register of deeds and a prosecuting attorney, whose duties and powers shall be provided by law." Const 1963, art 7, § 4 (emphasis added). The county sheriff is an independent officer whose powers and duties are dictated by law, not by the county. By statute, the county sheriff is given complete control over his/her deputies: "Each sheriff may appoint 1 or more deputy sheriffs at the sheriff's

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pleasure, and may revoke those appointments at any time." MCL 51.70. The sheriff is also given "charge and custody of the jails of his county, and of the prisoners in the same; and shall keep them himself, or by his deputy or jailer." MCL 51.75. The sheriff, not the county, controls the policies and procedures and exercises complete decision-making when it comes to deputy sheriffs and the jails of his county. Indeed, our Court of Appeals has concluded, that the county sheriff is given "complete discretion in appointing who will be a deputy." *People v Van Tubbergen*, 249 Mich App 354, 367; 642 NW2d 368 (2002) (emphasis added).

A trial court in the Eastern District of Michigan concluded that these Michigan laws acted in concert to prevent the county from being held liable for an alleged assault by deputy sheriffs. *Kroes v Smith*, 540 FSupp 1295, 1298 (ED Mich 1982) (Joiner, J). The Court reasoned that "[t]he law in Michigan makes it clear that the sheriff of a given county is the only official with direct control over the duties, responsibilities, and methods of operation of deputy sheriffs." *Id.* The Court concluded that these statutory provisions operated to prevent liability of the county for the actions of deputy sheriffs pursuant to 42 USC 1983. *Id.* Thus, a finding of non-liability places the protections to be afforded pursuant to state law on par with the protections afforded by the federal Equal Protection Clause.

Finally, as to the sheriff's department, "The sheriff's department, also named as a defendant, is an agency of the county. Const.1963, art. 7, s 6 relieves a county from responsibility under the circumstances here alleged." *Bayer*, 29 Mich App at 175. Thus, the sheriff's department is not a separate legal entity, and should be dismissed.

To allow the county to be liable based on *respondeat superior* would be to impose liability for the actions of someone whom the county cannot hire or fire, whose actions are at the "complete discretion" of another (the county sheriff), who works at a

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location in the "charge and custody" of the county sheriff, and over people similarly placed in the "charge and custody" of the county sheriff. "[T]he correct standard to assess respondeat superior liability is the control test." *Norris v State Farm Fire & Cas Co*, 229 Mich App 231, 239; 581 NW2d 746 (1998). Control over a servant's actions is the reason for imposing liability on the master. *Rogers*, 466 Mich at 650-51. By constitutional and statutory command, the county sheriff, not the county itself, is given control over deputy sheriffs. Furthermore, it makes little sense to hold that the county is immune from liability for the acts of the county sheriff pursuant to Const 1963, art 7, § 6, but would still retain liability for the subordinates of the sheriff, even though the sheriff himself is absolved from liability for the actions of his deputies by MCL 51.70. Thus, tertiary liability would exist for the county, even though there is no secondary liability on the part of the sheriff.

"[A]n employer is strictly liable ... for quid pro quo sexual harassment." *Chambers*, 463 Mich at 313. It would be fundamentally unfair to hold the county strictly liable for the acts of someone over whom it exercises no control.

II. A County Jail Is not a "Public Service" as that Term Is Used in the ELCRA.

Pursuant to the ELCRA, sexual harassment is a form of sex discrimination. MCL 37.2103(i). The ELCRA prohibits discrimination in certain instances:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

MCL 37.2302. "Public service is a defined term within the ELCRA.

> "Public service" means a public facility, department, agency, board, or commission, owned, operated, or managed by or on

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> behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public, except that public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment.

MCL 37.2301(b). If a county jail is not a "public service," within the meaning of the ELCRA, then there can be no liability. Of course, as to the employer, even if the ELCRA did apply to those in the custody of a correctional facility, there should be no *respondeat superior* liability for all the reasons stated in Argument, Section I, *supra*.

This Court's rules of statutory construction are well-established.

> It is axiomatic that statutory language expresses legislative intent. "A fundamental principle of statutory construction is that 'a clear and unambiguous statute leaves no room for judicial construction or interpretation.'" [*In re Certified Question (Kenneth Henes Special Projects Procurement v Continental Biomass*), 468 Mich 109, 113; 659 NW2d 597 (2003) (quoting *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993).] Where the statute unambiguously conveys the Legislature's intent, "the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case." [*Id.* at 113.]

Michigan Dept of Transp v Tomkins, 481 Mich 184, 191; 749 NW2d 716 (2008). The goal of statutory construction is to give effect to the intent of the Legislature, and "'unambiguous text plainly reflects the intent of the Legislature.'" *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003) (quoting *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002)). If it cannot reasonably said that the Wayne County Jail is a public facility established to provide a public service, then there can be no action for *quid pro quo* sexual harassment.

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A. The Court of Appeals Conclusion Renders Part of the Definition in MCL 37.2301(b), "Public Service," Mere Surplusage.

The Court of Appeals determined that "[a]s an inmate in the Wayne County Jail, plaintiff was entitled to the public service of being treated in accordance with her constitutional rights and with jail regulations. Johnson's exploitation of her status deprived her of this service." *Hamed v Wayne County*, 284 Mich App 681, 691; 775 NW2d 1 (2009). With due respect to the Court of Appeals, it framed the question wrong. Pursuant to the Court of Appeals' definition, the "public service" - treatment in accordance with one's rights and with jail regulations - was something to be provided at the Wayne County Jail. A "public service" is defined as a "public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public." MCL 37.2301(b). Using the Court of Appeals' definition, every facility where people must be treated according to their rights is a public service, which is to say, every public facility in the state is a public service. If all public facilities must provide the "public service" of treating people according to their rights, then it does not matter what the facility was "established to" do. If it was the Legislature's intent to include all facilities where people must be treated according to their rights, then the "established to provide a public service to the public" is a redundancy, adding nothing to the definition. If no public facility can possibly fall outside the definition of "public service" as defined by the Court of Appeals, then there is no reason for the language limiting the definition only to those public facilities established for a certain purpose.

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Per Justice Cavanagh, on behalf of a unanimous Court, "'[a]s far as possible, effect should be given to every phrase, clause, and word in the statute.'" *Herman v*

Berien County, 481 Mich 352, 366; 750 NW2d 570 (2008) (quoting *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999)). Also, per Justice Kelly, again on behalf of a unanimous Court, "'[w]henever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory.'" *People v Cannon*, 481 Mich 152, 158; 749 NW2d 257 (2008) (quoting *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007)) (emphasis added).[2]

If the ELCRA extends to every public facility where people are entitled to the being treated in accordance with their constitutional rights, then the ELCRA extends to every public facility, regardless of the reason for the facility's establishment. To read the definition as the Court of Appeals did, renders the language stating, "established to provide a public service to the public," as nothing more than surplus, excess words. The words were intended as a limitation, so that the protections extend not to every public facility in the state, but only to those established for the stated purpose: to provide a public service to the public." The Court of Appeals has read out this clearly intended limitation.

B. As to Those Confined within a Jail, the Facility Is Not a "Public Facility" and Does Not Provide a Service to the Public.

A jail does not exist to ensure people are treated in accordance with their rights or with jail regulations. It exists to confine and isolate people who break the law from, and who pose a serious enough risk to, the general public. As to an inmate, the jail does not provide a public service, and, in fact, does the opposite: It lawfully restrains their movement and liberty.

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[2] Justice Kelly wrote on behalf of Justices Corrigan, Young and Markman, and then-Justices Taylor and Weaver. Justice Cavanagh, in concurrence, joined this part of the opinion, making this rule of construction a unanimous pronouncement of this Court. *Id.* at 163.

When construing another statute designed to protect members of the public, the public building exception to governmental immunity, this Court has stated:

> Jail inmates are not members of the public for purposes of the public building exception. Unlike a person who enters a jail, e.g., to meet with an inmate, make a delivery, or apply for a job, an inmate does not visit a jail as a potential invitee. Instead, inmates are legally compelled to be there. Inmates thus are not within the class of persons the Legislature intended to protect from defects in public buildings.

Brown v Genesee County Bd of Comm'rs, 464 Mich 430, 439; 628 NW2d 471 (2001) (emphasis added).[3] Courts of foreign jurisdictions have also concluded that prisoners are not members of the public. *In Re Bode*, 74 Cal App 4th 1002, 1005-06; 88 Cal Rptr 2d 536, 539 (1999) concluding that a statute granting members of the public a transcript of a parole hearing at least 30 days before a prisoner's release " concerns the rights of members of the public, not the rights of prisoners. ... Its provisions create a right in favor of the public, not the prisoner[.]"); *Blizzard v Floyd*, 149 Pa Commw Ct 503, 506; 613 A2d 619, 621 (1992) (concluding that the general public is largely excluded from a correctional facility); *Skaff v West Virginia Human Rights Comm'n*, 191 WVa 161, 164; 42 SE2d 39, 42 (1994) (drawing a distinction between members of the general public and prisoners in the context of a state civil rights law, and noting that the prisoner is not relief, as the Eighth and Fourteenth Amendments of the United States Constitution protect a prisoner from the threat of violence and sexual assault).

Put simply, those confined in correctional facilities are different from members of the public and are subject to limited rights and freedoms. "The fact of confinement and the needs of the penal institution impose limitations on constitutional rights,

Mellon Pries
2150 Butterfield Dr.
Suite 100
Troy, MI 48084

248-649-1330

[3] As to this conclusion, a majority opinion was formed as Justice Markman concurred with the plurality opinion of Justice Young and Corrigan, and then-Justice Weaver, "that an inmate is not a member of the public[.]" *Id.* at 440.

including those derived from the First Amendment, which are implicit in incarceration." *Jones v North Carolina Prisoners' Labor Union, Inc*, 433 US 119, 125 (1977). Furthermore, prisoners are not a suspect class for purposes of the Equal Protection Clause of the United States Constitution. *Hampton v Hobbs*, 106 F3d 1281, 1286 (6th Cir 1997). The Courts of this State have recognized that inherent in incarceration is the "necessary withdrawal or limitation of many privileges and rights" enjoyed members of the public community; "'[T]here is a salient difference between persons who are members of the public community and prison inmates in that the latter, by law, are prohibited from exercising the rights and privileges they enjoyed as free members of society.'" *Mackey v Dept of Corr*, 205 Mich App 330, 332; 517 NW2d 303 (1994) (quoting *Mithrandir v Dept of Corr*, 164 Mich App 143, 147-148; 416 NW2d 352 (1987)).

The limitations placed on prisoners compared to members of the general public are manifest. *Manville v Bd of Governors of Wayne State Univ*, 85 Mich App 626, 636; 272 NW2d 162 (1972) (concluding the plaintiff had no cause of action under the Minimum Wage Law, MCL 408.381 *et seq.*, and stating, "[b]ecause of the unique situation of prison employment, it is likely that inmate employees were never intended to be given the protection afforded the general population under the Minimum Wage Law."): *Wolff v McDonnell*, 418 US 539, 555 (1974) (observing that while prisoners are not wholly stripped of their rights, "[l]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a 'retraction justified by the considerations underlying our penal system.'): MCL 15.231(2) (exempting prisoners from the class of persons entitled to obtain public records pursuant to the Freedom of Information Act (hereafter, "FOIA")): *Proctor v White Lake Twp Police Dept*, 248 Mich App 457, 470; 639 NW2d 332 (2001) (upholding the constitutionality of the exclusion of prisoners from FOIA): *People v Ison*, 132 Mich App 61, 64; 346 NW2d 894 (1984)

Mellon Pries
2150 Butterfield Dr.
Suite 100
Troy, MI 48084

248-649-1330

(noting that a prisoner only "retain[s] some constitutional rights" (emphasis added)): 42 USC § 1997e of the Prison Litigation Reform Act (subjecting prisoners to litigation restrictions not imposed on the non-incarcerated): *People v Herndon*, 246 Mich App 371, 397; 633 NW2d 376 (2001) (finding that prisoners lack a reasonable expectation of privacy in their cells): *Hudson v Palmer*, 468 US 517, 528 (1984) ("[I]t is accepted by our society that '[l]oss of freedom of choice and privacy are inherent incidents of confinement'").

A correctional facility is a highly regulated and regimented facility. To the extent members of the public are allowed, they are allowed in certain designated areas at certain times, for limited amounts of time, subject to the constant monitoring of corrections officials. Those being detained by the facility are not free to leave, and are subject to already diminished rights and privileges. It cannot be said that, as to inmates, a correctional facility is a public facility established to provide a public service. Indeed, it is generally a non-public facility established to confine those who commit crimes or are otherwise being lawfully detained. A correctional facility exists to isolate, not serve, inmates, and thus, is not a "public service" within the meaning of the ELCRA.

In the context of the public building exception to governmental immunity, this Court has held:

> To determine whether a building is open for use by members of the public, the nature of the building and its use must be evaluated. The government, of course, controls the use that will be made of its buildings. If the government has restricted entry to the building to those persons who are qualified on the basis of some individualized, limiting criteria of the government's creation, the building is not open to the public.

Maskery v Bd of Regents of the Univ of Michigan, 468 Mich 609, 618; 664 NW2d 165 (2003). This Court went on to conclude that a university dormitory "was not open for use by members of the public. Members of the public could not enter the building

Mellon Pries
2150 Butterfield Dr.
Suite 100
Troy, MI 48084

248-649-1330

without using a courtesy phone to contact a resident and asking the resident to unlock the door." *Id.* at 620. It would be an anomalous result to conclude a college dormitory is not "open for use by members of the public" because guests must be allowed in by any resident, while at the same time holding a correctional facility - where access is controlled by a centralized structure of corrections officers and visitors may be subject to search, may be denied admission for a host of reasons, and must proceed only to certain designated areas, often subject to numerous security checkpoints and separately locked areas - is a public facility.

Exceptions to governmental immunity and civil rights law relate to personal injuries, and create remedies or defenses for such injuries.

> Statutes that relate to the same subject or that share a common purpose are in pari materia and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *State Treasurer v. Schuster*, 456 Mich. 408, 417, 572 N.W.2d 628 (1998). "Statutes relate to the same subject if they relate to the same person or thing or the same class of persons or things." *Houghton Lake Area Tourism & Convention Bureau v. Wood*, 255 Mich.App. 127, 147, 662 N.W.2d 758 (2003).

Walters v Leech, 279 Mich App 707, 709-10; 761 NW2d 143 (2008); *see also People v Rogers*, 438 Mich 602, 608; 475 NW2d 717 (1991). Therefore the conclusion that prisoners are not members of the public as made in the context of tort law should apply to the related field of civil rights actions for personal injuries.

C. The 1999 Amendatory Language of MCL 37.2301(b) Clearly Excludes Correctional Facilities as a "Public Service."

In 1998, the Court of Appeals concluded that correctional facilities "are places of 'public service' within the meaning of subsection 301(b) [of the ELCRA]." *Neal v Dept of Corr*, 232 Mich App 730, 735; 592 NW2d 370 (1998). The Legislature responded in 1999, by amending MCL 37.2301(b), to add an explicit exception to the definition of

Mellon Pries
2150 Butterfield Dr.
Suite 100
Troy, MI 48084

248-649-1330

"public service" "that public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment." MCL 37.2301(b). The Legislature further provided, in amending MCL 37.2301(b), that the amendment was meant to cure "any misinterpretation of the legislative intent" from *Neal*.

The Persons With Disabilities Civil Rights Act (hereafter, "PWDCRA") contains the exact same language regarding prisoners as the ELCRA: "public service does not include a state or county correctional facility with respect to actions or decisions regarding an individual serving a sentence of imprisonment." MCL 37.1301(b). The Court of Appeals considered whether this 1999 amendatory language to the PWDCRA should be applied retroactively and concluded that "[r]etroactive application of the amended definition of "public service" would impair plaintiffs' cause of action under the PWDCRA, because prisons would be excluded as places of public service prohibited from discriminating on the basis of disability." *Doe v Dept of Corr*, 249 Mich App 49, 62; 641 NW2d 269 (emphasis added). The Court did not hold that prisons could be excluded dependent on certain factors or considerations, but rather simply that "prisons would be excluded as places of public service." As the definition at issue is identical, the same blanket exclusion should apply. The Legislature intended to exempt correctional facilities from the ELCRA.

CONCLUSION

For all these reasons, and for the reasons stated in the Wayne County Brief, this Honorable Court should conclude that the ELCRA does not apply to create liability on

Mellon Pries
2150 Butterfield Dr.
Suite 100
Troy, MI 48084

248-649-1330

behalf of an employer for a sexual assault committed by its employee, and that a correctional facility is not a "public service" as that term is used in the ELCRA.

MELLON PRIES, P.C.

By: _____

JAMES T. MELLON (P23876)
DAVID A. KOWALSKI (P71179)
Attorneys for Amicus MMRMA
2150 Butterfield Drive, Suite 100
Troy, MI 48084
(248) 649-1330

Dated: November 15, 2010

Mellon Pries
2150 Butterfield Dr.
Suite 100
Troy, MI 48084

248-649-1330

A

STATE OF MICHIGAN

COURT OF APPEALS

MARY DOE,

Plaintiff-Appellant,

v

MARSHALL A. SHAPIRO, DO, PATRICIA SOBOLAK, RN, CARO COMMUNITY HOSPITAL, KIMBALL W. SILVERTON, DO, SILVERTON SKIN INSTITUTE, PLLC, GENESYS HEALTH SYSTEM,

Defendants-Appellees.

UNPUBLISHED
March 4, 2008

No. 273950
Genesee Circuit Court
LC No. 04-079118-NH

JANE DOE,

Plaintiff-Appellant,

v

MARSHALL A. SHAPIRO, DO, PATRICIA SOBOLAK, RN, CARO COMMUNITY HOSPITAL,

Defendants-Appellees.

and

KIMBALL W. SILVERTON, DO, SILVERTON SKIN INSTITUTE, GENESYS HEALTH SYSTEM,

Defendants.

No. 273962
Genesee Circuit Court
LC No. 04-079120-NH

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

In this consolidated negligence/medical malpractice and vicarious liability action, plaintiff Mary Doe appeals as of right the trial court's grant of summary disposition in favor of defendants Marshall A. Shapiro, D.O., Patricia Sobolak, R.N., Caro Community Hospital, Kimball W. Silverton, D.O., Silverton Skin Institute, PLLC, and Genesys Health System in Docket No. 273950. Plaintiff Jane Doe appeals as of right the trial court's grant of summary disposition in favor of defendants Marshall A. Shapiro, D.O., Patricia Sobolak, R.N., and Caro Community Hospital in Docket No. 273962.[1] Because the trial court properly denied as futile plaintiffs' motions to amend their complaints; because no evidence of a special relationship or ostensible agency existed; and, because no evidence that material questions of fact remained, the trial court properly granted defendants' motions for summary disposition. And, finally, because plaintiff Mary Doe failed to file affidavits of merit with respect to her claims against Silverton and Silverton Skin Institute, we affirm.

I

These consolidated cases arise from alleged sexual assaults committed by Howard Stickney, a certified registered nurse anesthetist (CRNA), while he provided anesthesia services on plaintiffs during surgical procedures performed by Dr. Silverton at the Silverton Skin Institute at premises leased from Genesys Health System. Stickney was an independent contractor through his own firm, Professional Anesthesia Services, PC.

Plaintiff Mary Doe alleged that during the afternoon of December 5, 2001, she underwent an outpatient, elective, cosmetic surgical procedure performed by Dr. Silverton at the Silverton Skin Institute. Dr. Silverton and the Silverton Skin Institute engaged Stickney to provide anesthesia services necessary for the surgery under Dr. Silverton's supervision. Following the surgery, as Mary Doe began to come out of the effects of the anesthesia, she alleges that she realized Stickney was inserting his penis into her mouth.

Plaintiff Jane Doe alleged that on April 24, 2002, she underwent an outpatient surgical procedure performed by Dr. Silverton at the Silverton Skin Institute. Dr. Silverton engaged Stickney to provide anesthesia services necessary for the surgery. Following the surgery, as Jane Doe began to come out of the effects of the anesthesia, Stickney was alone with her in the surgical suite. When a medical assistant returned to the surgical suite she saw that Stickney was standing near Jane Doe's head moving his hips back and forth.

These alleged assaults form the basis of plaintiffs' claims against the respective defendants. The trial court granted summary disposition in favor of all defendants. It is from these orders that plaintiffs now appeal.

II

This Court reviews de novo a decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Willis v Deerfield Twp*, 257 Mich App 541, 548; 669 NW2d 279 (2003). A motion for summary disposition under MCR

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[1] Defendants Kimball W. Silverton, D.O., Silverton Skin Institute, PLLC, and Genesys Health System were originally parties to plaintiff Jane Doe's appeal. However, since filing her appeal with this Court, she has stipulated to dismiss these parties from her appeal.

2.116(C)(8) tests the legal sufficiency of the pleadings alone. *Johnson-McIntosh v Detroit*, 266 Mich App 318, 322; 701 NW2d 179 (2005). A motion under subrule (C)(8) is properly granted if no factual development could justify recovery under the plaintiff's claim. *Id.* A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the nonmoving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30-31.

III

On appeal, both plaintiffs argue that the trial court erred when it denied their motions to amend their complaints to plead a violation of MCL 750.411 ruling that the plain language of the statute did not fit the instant facts. Because Jane Doe has dismissed Silverton, Silverton Skin Institute, and Genesys Health Systems from her case on appeal, her alleged errors regarding her motion to amend her complaint pertain only to defendants Shapiro, Sobolak, and Caro Community Hospital. Mary Doe wages her allegations of error regarding her motion to amend her complaint against defendants Shapiro, Sobolak, and Caro Community Hospital.

The grant or denial of a motion for leave to amend pleadings is reviewed for an abuse of discretion. *Titan Ins Co v North Pointe Ins Co*, 270 Mich App 339, 346; 715 NW2d 324 (2006). "An abuse of discretion occurs when the decision [of the trial court] results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Under MCR 2.118(A)(2), a party may move to amend a pleading by leave of the court, and "[l]eave shall be freely given when justice so requires." MCR 2.118(E) provides:

> On motion of a party the court may, on reasonable notice and on just terms, permit the party to serve a supplemental pleading to state transactions or events that have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or a defense.

In *Miller v Chapman Contracting*, 477 Mich 102, 105; 730 NW2d 462 (2007), our Supreme Court reiterated the well-established principles regarding motions to amend pleadings:

> Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile . . . . [Citations and internal quotation marks omitted.]

"The rules pertaining to the amendment of pleadings are designed to facilitate amendment except when prejudice to the opposing party would result; amendment is generally a matter of right rather than grace." *PT Today, Inc v Comm'r of the Office of Financial & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006).

MCL 750.411 provides in pertinent part:

> (1) A person, firm, or corporation conducting a hospital or pharmacy in this state, the person managing or in charge of a hospital or pharmacy, or the person in charge of a ward or part of a hospital to which 1 or more persons come or are brought suffering from a wound or other injury inflicted by means of a knife, gun, pistol, or other deadly weapon, or by other means of violence, has a duty to report that fact immediately, both by telephone and in writing, to the chief of police or other head of the police force of the village or city in which the hospital or pharmacy is located, or to the county sheriff if the hospital or pharmacy is located outside the incorporated limits of a village or city. The report shall state the name and residence of the person, if known, his or her whereabouts, and the cause, character, and extent of the injuries and may state the identification of the perpetrator, if known.
>
> (2) A physician or surgeon who has under his or her charge or care a person suffering from a wound or injury inflicted in the manner described in subsection (1) has a duty to report that fact in the same manner and to the same officer as required by subsection (1).
>
> (3) A person, firm, or corporation that violates this section is guilty of a misdemeanor.

"'Well established principles guide this Court's statutory construction efforts. We begin our analysis by consulting the specific statutory language at issue.'" *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 458; 733 NW2d 766 (2006), quoting *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002). "This Court gives effect to the Legislature's intent as expressed in the statute's terms, giving the words of the statute their plain and ordinary meaning." *McManamon v Redford Charter Twp*, 273 Mich App 131, 135; 730 NW2d 757 (2006). "When the language poses no ambiguity, this Court need not look outside the statute, nor construe the statute, but need only enforce the statute as written." *Id.*, at 136. This Court does not interpret a statute in a way that renders any statutory language surplusage or nugatory. *Pohutski v City of Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002).

Plaintiffs argue on appeal that defendants Sobolak, Caro Community Hospital, and Shapiro negligently failed to inform police agencies and medical licensing authorities of alleged sexual attacks on female patients perpetrated by Stickney prior to plaintiffs' alleged attacks. We will address each of the three defendants referenced in turn.

First, we address Sobolak. Plaintiffs allege that Sobolak, a nurse and employee of Dr. Shapiro, negligently failed to inform police agencies and medical licensing authorities of her personal observations of an alleged sexual attack of one of Dr. Shapiro's female patients perpetrated by Stickney on April 30, 2001. Plaintiffs' argument fails for two reasons. First, plaintiffs admitted at oral argument on appeal that MCL 750.411 does not apply to Sobolak on its face because as a nurse she does not fall under the purview of MCL 750.411(1) that applies to hospitals and pharmacies, or MCL 750.411(2) that applies to physicians and surgeons.

Plaintiffs' argument regarding Sobolak also fails because of this Court's holding in *Marcelletti v Bathani*, 198 Mich App 655, 659-663; 500 NW2d 124 (1993). In *Marcelletti*, this Court reviewed Michigan's child abuse reporting statute, MCL 722.633, in the context of the same type of presented claims with issues similar to those presented in this matter. The *Marcelletti* Court held that the plain language of MCL 722.623(1) indicated "the Legislature intended that liability under the statute be limited to claims for damages by the identified abused child about whom no report was made." *Id.*, at 659. Like *Marcelletti*, neither the statute at issue, MCL 750.411(1) or (2), nor any case law addressing such a duty to report referenced by plaintiffs provide that the reporting duty runs to any person other than the alleged "person suffering from a wound or injury." The purpose of MCL 750.411 is to engage the criminal process for the protection of the discrete victim and not for an indirect purpose of potential protection of other unknown persons. We therefore conclude that the trial court did not err when it denied plaintiffs' motions to amend their complaints because the prior claims related to alleged victims other than plaintiffs. See *Marcelletti, supra* at 659-663. Therefore, regarding defendant Sobolak, the trial court did not err when it denied as futile, plaintiffs' motion to amend their complaints to add a violation of MCL 750.411.

Next, we address plaintiffs' claims regarding defendant Caro Community Hospital. Plaintiffs allege that Caro Community Hospital administration negligently failed to inform police agencies and medical licensing authorities of an alleged sexual attack of a female patient perpetrated by Stickney on May 15, 2001. Plaintiffs assert that Caro Community Hospital's alleged failure to report this alleged incident should properly form the basis of a violation of MCL 750.411 and thus, the trial court erred when it denied their motion to amend their complaints as futile. Plaintiffs' argument fails for three reasons. First, the record reveals that a patient at Caro Community Hospital reported the possibility that an untoward incident occurred between Stickney and another patient in a companion bed behind a pulled screen. After receiving the report, Caro Community Hospital conducted an investigation of the alleged incident. During the investigation, the patient actually involved denied the incident. Caro Community Hospital took no further action because after the involved patient denied that the incident occurred, there was nothing to report. Since there was no incident to report, Caro Community Hospital did not violate MCL 750.411 because it had no duty to report an incident that did not occur.

Secondly, we must consult the specific statutory language of the applicable statute at issue, MCL 750.411(1). MCL 750.411(1) states that hospitals and pharmacies must report individuals who "come or are brought [to the hospital] suffering from a wound or other injury inflicted by means of a knife, gun, pistol, or other deadly weapon, or by other means of violence" to the police. MCL 750.411(1). This language poses no ambiguity and must be enforced as written. *McManamon, supra* at 135-136. The facts presented show that the alleged victim did not come to Caro Community Hospital suffering from a wound or other injury inflicted by means of a knife, gun, pistol, or other deadly weapon, or by other means of violence. Instead, any alleged injuries occurred during treatment and therefore do not come within the ambit of MCL 750.411(1).

Third, like Sobolak, we conclude that the trial court did not err when it denied plaintiffs' motions to amend their complaints as it relates to Caro Community Hospital because of this Court's holding in *Marcelletti, supra*. The *Marcelletti* Court counsels that a reporting duty does

not run to any person other than the alleged "person suffering from a wound or injury." See *Marcelletti, supra* at 659-663. Thus, had the May 15, 2001 incident (1) actually occurred, and (2) occurred as described in, and met the requirements of MCL 750.411(1), the only person who could assert a violation of MCL 750.411(1) pursuant to *Marcelletti, supra,* would have been the alleged victim of the incident, not plaintiffs. *Id.* Therefore, regarding defendant Caro Community Hospital, the trial court did not err when it denied as futile, plaintiffs' motion to amend their complaints to add a violation of MCL 750.411(1).

Finally, we address plaintiffs' claims regarding defendant Shapiro. Plaintiffs allege Dr. Shapiro negligently failed to inform police agencies and medical licensing authorities of an alleged sexual attack on a female patient under his care perpetrated by Stickney on September 9, 1998. Plaintiffs assert that defendant's alleged failure to report this alleged incident should properly form the basis of a violation of MCL 750.411(2) and thus, the trial court erred when it denied their motion to amend their complaints as futile. However, plaintiffs' arguments once again fail by virtue of the Court's holding in *Marcelletti, supra*. See *Marcelletti, supra* at 659-663. Again, plaintiffs cannot assert a claim for violation of MCL 750.411(2) against defendant Shapiro for alleged injuries suffered by a victim other than themselves.[2]

IV

Next, plaintiffs argue that the trial court erred when it erroneously concluded that plaintiffs could not sustain claims in negligence against defendants as a matter of law under either a special relationship theory or a theory of ostensible agency, and further, that no material questions of fact remained on the record. Plaintiffs, in their common law claims, assert this error against all defendants. Jane Doe has dismissed defendants Silverton, Silverton Skin Institute, and Genesys Health Systems from her appeal, therefore we will address her asserted errors against only defendants Shapiro, Sobolak, and Caro Community Hospital. We will address Mary Doe's alleged errors against all defendants.

The existence of a duty is ordinarily a question for the trial court to decide as a matter of law. *Cook v Bennett*, 94 Mich App 93, 98; 288 NW2d 609 (1979). If the question of duty involves no disputed factual issues, and the court concludes that a defendant owes the plaintiff no duty, summary disposition is proper. *Id.* This Court reviews de novo a trial court's determination whether a defendant owes a duty toward a plaintiff. *Ghaffari v Turner Construction Co (On Remand)*, 268 Mich App 460, 465; 708 NW2d 448 (2005).

To prevail in a negligence claim, a plaintiff must prove four elements: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "[A] negligence action may be

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[2] Plaintiff has assigned error in the trial court's denial of the motion to amend the Jane Doe complaint predicated on Silverton and Silverton Skin Institute's failure to report the alleged earlier incident involving Mary Doe. Resolution of Jane Doe's claims against Silverton and Silverton Skin Institute by stipulation during the pendency of this appeal renders that assigned error moot.

maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002). In determining whether a duty exists, courts consider many different variables, including:

> (1) foreseeability of the harm, (2) degree of certainty of injury, (3) existence of a relationship between the parties involved, (4) closeness of connection between the conduct and injury, (5) moral blame attached to the conduct, (6) policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. The mere fact that an event may be foreseeable is insufficient to impose a duty upon the defendant. [*Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997) (citations omitted).]

A. Special Relationship

In general, there is "no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party." *Graves, supra* at 493. "The rationale underlying this general rule is the fact that '[c]riminal activity, by its deviant nature, is normally unforeseeable.'" *Id.*, quoting *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989). However, social policy has led courts to recognize an exception to this general rule where a special relationship exists between a plaintiff and a defendant. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). Some examples of special relationships that have been recognized under Michigan law include a landlord and tenant, proprietor and patron, employer and employee, residential invitor and invitee, carrier and passenger, innkeeper and guest, and doctor and patient. *Graves, supra* at 494; *Marcelletti, supra* at 664. The rationale for "imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety." *Williams, supra* at 499; also see *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 8-9; 492 NW2d 472 (1992). Moreover, such a special relationship must be sufficiently strong to require a defendant to take action to benefit the injured party. *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 406; 224 NW2d 843 (1975).

(1) *Defendants Shapiro, Sobolak, and Caro Community Hospital*[3]

In this case, regarding defendants Shapiro, Sobolak, and Caro Community Hospital, plaintiffs have not shown that a special relationship exists between these defendants and plaintiffs. The record reveals that defendants Shapiro, Sobolak, and Caro Community Hospital had no relationship with plaintiffs let alone exerted any control over either plaintiff. Plaintiffs were never patients of Dr. Shapiro, Nurse Sobolak, or Caro Community Hospital on the date of the alleged incident or at any other time. And, defendants Shapiro, Sobolak, and Caro

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[3] Both Jane Doe and Mary Doe assert error against these defendants under the special relationship theory.

Community Hospital had no control over Stickney, an independent contractor, while he provided anesthesia services to plaintiffs at the offices of a completely separate physician, Dr. Silverton, at a separate facility, the Silverton Skin Institute.

Again, an individual has no duty to protect another who is endangered by a third person's conduct. But where there is a duty to protect an individual from harm by a third person, that duty to exercise reasonable care arises from a "special relationship" either between the defendant and the victim, or the defendant and the third party who caused the injury. *Marcelletti, supra* at 664. Because there was no relationship at all between defendants Shapiro, Sobolak, and Caro Community Hospital and plaintiffs, there can be no "special relationship" and no concomitant duty to protect either plaintiff from the criminal acts of a third party. Similarly, no special relationship exists between Stickney, an independent contractor, and defendants because of their past engagements. The record displays that defendants Shapiro, Sobolak, and Caro Community Hospital had no control over Stickney at the time of the incidents. He not only was an independent contractor employed by his own professional corporation when providing services, but his services were independently hired out to other physicians and facilities both unknown and distant to these defendants. We therefore conclude that no duty exists. It is axiomatic that there can be no tort liability unless a defendant owed a duty to a plaintiff. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). The trial court properly granted summary disposition in favor of defendants Shapiro, Sobolak, and Caro Community Hospital because no recognized relationship existed creating a legal duty to either plaintiff.

(2) *Defendant Genesys Health System*[4]

Genesys Health System had no relationship with Mary Doe or Stickney because it only leased office space to Dr. Silverton for his private offices. As such, because there was no relationship at all between defendant Genesys Health System and Mary Doe, there can be no "special relationship" and no responsibility to protect her from the criminal acts of a third party. Also, this defendant was not even aware of the existence of Stickney, who happened to provide anesthesia services on property it leased for private medical office space. Therefore, the trial court properly granted summary disposition in favor of defendant Genesys Health System because no recognized relationship existed creating a legal duty to Mary Doe. *Marcelletti, supra* at 664.

(3) *Defendants Silverton and Silverton Skin Institute*[5]

The facts show that plaintiff Mary Doe was a patient of defendants Silverton and Silverton Skin Institute, thus a doctor and patient relationship existed. Again, special relationships have been recognized to exist when a doctor and patient relationship exists. *Graves, supra* at 494; *Marcelletti, supra* at 655. There exists a "special relationship" between a doctor and the doctor's patient where there is some degree of "readily identifiable" forseeable danger.

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[4] Only Mary Doe asserts error against this defendant under the special relationship theory.

[5] Only Mary Doe asserts error against these defendants under the special relationship theory.

Id. Actual or constructive knowledge on the part of the defendant of some danger to be protected against is usually a critical factor in determining whether a special relationship exists. See *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 403-406; 224 NW2d 843 (1975). This is related to the requirement of foreseeability because foreseeability depends on knowledge. *Id.* at 405. The existence of a duty depends in part on foreseeability, i.e., whether it was foreseeable that the actor's conduct may create a risk of harm to the victim. *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977); *Goldman v Phantom Freight, Inc*, 162 Mich App 472, 481; 413 NW2d 433 (1987). Forseeability depends in large part on knowledge, but also "upon whether or not a reasonable man could anticipate that a given event might occur under certain conditions." *Samson, supra* at 405-406.

Whether the risk of harm from third-party criminal activity is foreseeable in a particular case is generally a question of fact for the jury. *Holland v Liedel*, 197 Mich App 60, 63; 494 NW2d 772 (1992). But, in this case, plaintiff Mary Doe has wholly failed to satisfy her burden to establish a genuine issue of material fact. Plaintiff Mary Doe failed to demonstrate that Silverton and the Silverton Skin Institute had actual or constructive knowledge because she presented no testimonial or documentary evidence to indicate that Silverton and the Silverton Skin Institute either knew or should have known that Stickney might sexually assault a patient. The fact that Mary Doe brought an action against Shapiro, Sobolak, and Caro Community Hospital for *failing* to report alleged assaults that Stickney committed at their facilities prior to the alleged assaults on plaintiffs supports Silverton's lack of knowledge. Following plaintiff's own assertion to its logical end: if Shapiro, Sobolak, and Caro Community Hospital never informed anyone about the previous alleged assaults, then Silverton and Silverton Skin Institute could not have known about the previous alleged assaults or have any reason to believe that contracting with Stickney might pose a risk to their patients.

The only evidence plaintiff Mary Doe relies on is her own self-serving deposition testimony that she informed Dr. Silverton's nurse manager Liz Niec after her surgery that Stickney assaulted her as she was coming out of the effects of the anesthesia. While there may be a dispute regarding what was told to Niec--Niec specifically denying that she was advised of an assault--Mary Doe admitted to specifically telling Niec twice *not* to tell Dr. Silverton that she believed she had been assaulted by Stickney. Because plaintiff Mary Doe provided no evidence to support the conclusion that defendants Silverton and Silverton Skin Institute were aware or should have been aware that Stickney might sexually assault a patient, Stickney's conduct was not foreseeable. Therefore, plaintiff Mary Doe failed to establish a genuine issue of material fact regarding whether defendants Silverton and Silverton Skin Institute owed her duty to protect her from an unforeseeable sexual assault, and summary disposition under a "special relationship" theory was proper.

B. Ostensible Agency

An ostensible agency may be created "'when the principal intentionally or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.'" *VanStelle v Macaskill*, 255 Mich App 1, 9; 662 NW2d 41 (2003), quoting *Grewe v Mt Clemens Gen Hosp*, 404 Mich 240, 252-253; 273 NW2d 429 (1978). Under the theory of ostensible agency, a principal may be vicariously liable for the malpractice of actual or apparent agents. *Id.* As stated by this Court in *Chapa v St Mary's Hosp of Saginaw*, 192 Mich App 29, 33-34; 480 NW2d 590 (1991):

> The following three elements . . . are necessary to establish the creation of an ostensible agency: (1) the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one, (2) the belief must be generated by some act or neglect on the part of the principal sought to be charged, and (3) the person relying on the agent's authority must not be guilty of negligence. [Citations omitted.]

(1) *Defendants Silverton and Silverton Skin Institute*[6]

Mary Doe argues that Silverton and Silverton Skin Institute are liable for Stickney's actions by virtue of an ostensible agency wherein Silverton engaged Stickney's anesthesia services and provided him both the patient and instrumentalities. Under the theory of ostensible agency in this context, Silverton and Silverton Skin Institute are the principals to be charged for providing the agent Stickney. We need not engage in an inquiry regarding each element of ostensible agency. Even if Mary Doe could successfully establish the elements of an ostensible agency in an attempt to fix liability on Silverton and Silverton Skin Institute for Stickney's alleged intentional acts, her argument fails because Michigan law does not subscribe to a theory creating vicarious liability in a principal for the commission of an unknown criminal act by an agent aided in that act through the agency relationship. *Zsigo v Hurley Medical Center*, 475 Mich 215, 231; 716 NW2d 220 (2006).

Further, in general, an employer is not liable for the tortious acts of its employees who are acting outside the scope of their authority. *Zsigo, supra* at 223. We do note that the *Zsigo* Court did state that employers can be "subject to liability for their negligence in hiring, training, and supervising their employees." *Id* at 227. But, in particular, when discussing the rule of respondeat superior employer liability, the *Zsigo* Court flatly rejected the assertion that a principal is liable if the agent is aided in the accomplishment of a tort by the existence of the agency relationship. *Id.* Hence, under *Zsigo*, Mary Doe's argument that Silverton and Silverton Skin Institute are liable for Stickney's intentional acts by virtue of an ostensible agency cannot be successful. *Id.* Therefore, Mary Doe's arguments fails as a matter of law by application of *Zsigo. Id.*

Moreover, the rule exempting vicarious liability in the principal for the unknown criminal acts of its agent finds support in *Brown v Brown*, 478 Mich 545, 566; 739 NW2d 313 (2007). Our Supreme Court recently overruled a conclusion by a panel of this Court that "an employer may share liability for intentional torts committed by an employee who is acting beyond the scope of employment if the employer knew, or should have known, of the employee's violent propensities." *Brown v Brown*, 270 Mich App 689, 694; 716 NW2d 626 (2006), citing *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412-413; 189 NW2d 286 (1971). In *Brown*, the plaintiff worked the night shift as a security guard in a plant. The plaintiff complained to her employer at least three times that another employee, Michael Brown, "routinely" "made sexually explicit and offensive comments" that "made her uncomfortable." *Brown, supra* at 478 Mich 549, 566.

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[6] Only Mary Doe asserts error against these defendants under the ostensible agency theory.

Despite the plaintiff's complaints and requests to her employer, the vulgar and offensive comments continued. Ultimately, Brown raped the plaintiff. Our Supreme Court held that the defendant employer was not vicariously liable for Brown's actions because "[d]efendant could not reasonably have anticipated that Brown's vulgarities would culminate in a rape." *Id.*, at 566.

The defendant employer in *Brown, supra*, was aware of a high level of unwanted sexual advances and a propensity for vulgar and offensive sexually based speech made by Brown. Despite this information, our Supreme Court found that the defendant employer's knowledge was not enough to make Brown's criminal act foreseeable, i.e., it was not foreseeable that Brown's conduct may have created a risk of harm to the victim. *Brown, supra* at 566. The facts of the instant case, where plaintiff Mary Doe has shown no evidence that Silverton had any knowledge whatsoever that Stickney had the propensity to commit sexual assault, do not rise to the level of those in *Brown, supra*. Hence, when applying the rules enunciated by our Supreme Court in *Zsigo, supra*, and *Brown, supra*, we conclude that plaintiff Mary Doe's argument that liability is created by virtue of an ostensible agency relationship fails.

(2) *Defendant Genesys Health System*[7]

Mary Doe argues that Genesys Health System is liable for Stickney's actions by virtue of an ostensible agency. In general, a hospital is not vicariously liable for the negligence of a physician who is an independent contractor and only uses a hospital or medical center's facilities to provide treatment to patients. *Grewe, supra* at 250; *VanStelle, supra* at 8. But, "if the individual looked to the hospital to provide him with medical treatment and there has been a representation by the hospital that medical treatment would be afforded by physicians working therein, an agency by estoppel can be found." *Grewe*, supra at 250-251.

Here, Mary Doe has not provided evidence on the record to display anything more than a property leasing arrangement between Genesys Health System and Silverton or the Silverton Skin Institute. Under these facts, a lease arrangement does not create an ostensible agency without more. Mary Doe has not provided any evidence that Genesys Health System was in any way a referring hospital system under the facts presented. The record displays that Mary Doe had specifically sought out treatment from Dr. Silverton and the Silverton Skin Institute on her own volition. Mary Doe provided no evidence that she looked to, received, or relied on representations made by Genesys Health Systems to provide her with a physician or any other medical care. *Grewe*, supra at 250-251. Because Mary Doe did not look to Genesys Health System for a reference to a physician or other health care provider, and because Mary Doe had a prior relationship with Silverton and Silverton Skin Institute and not Genesys Health System, an ostensible agency did not exist. Thus, Genesys Health System cannot be liable for the actions, neglect, or misconduct of Silverton, Silverton Skin Institute, or Stickney. *Grewe, supra* at 250-251; *VanStelle, supra* at 8.

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[7] Only Mary Doe asserts error against this defendant under the ostensible agency theory.

3. Remaining Assertions of Material Questions of Fact

All that remains are plaintiff Mary Doe's generalized assertions that material questions of fact exist on the record regarding: defendant Silverton's duty to any and all patients while under sedation, what defendants may have known about Stickney's alleged assaults on sedated patients; vicarious liability relations amongst all named defendants; special relationships amongst the parties imposing legal duties on them to act for plaintiffs' protection; inadequacy of defendants' response to actual notice or knowledge of the assaults; whether Stickney was an ostensible, apparent, and/or direct agent of defendants Silverton, Silverton Skin Institute, and Genesys. Providing generalized assertions that material questions of fact exist without more is not enough to survive summary disposition. To avoid summary disposition under MCR 2.116(C)(10), a plaintiff must offer admissible documentary evidence. Plaintiff Mary Doe has not met this burden. When proffered admissible evidence does not establish a genuine issue regarding any material fact for trial, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Further, this Court is not required to search the record for factual support for a party's claim. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

V

Finally, plaintiff Mary Doe asserts that the trial court erred when it granted summary disposition in part because she did not file affidavits of merit with respect to her claims against Silverton and Silverton Skin Institute due to the fact that they were not required in this vicarious liability action. Defendants Silverton and Silverton Skin Institute respond that plaintiff Mary Doe's claims, although labeled as vicarious liability claims, are actually medical malpractice claims and affidavits of merit were required.

It is well established that "[t]he gravamen of an action is determined by reading the claim as a whole," *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993), and looking "beyond the procedural labels to determine the exact nature of the claim." *MacDonald v Barbarotto*, 161 Mich App 542, 547; 411 NW2d 747 (1987). Our Supreme Court has held that "'a complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence.'" *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999), quoting *McLeod v Plymouth Court Nursing Home*, 957 F Supp 113, 115 (E D Mich, 1997).

A medical malpractice claim arises from the course of a professional relationship, and it involves questions of medical judgment beyond the scope of common knowledge and experience. A claim of ordinary negligence raises issues within the common knowledge and experience of a factfinder. In determining whether a claim sounds in medical malpractice or ordinary negligence, a court must consider: (1) whether the claim pertains to an action that occurred in the context of a professional relationship; and (2) whether the claim raises questions of medical judgment that are beyond the realm of common knowledge and experience. If both questions are answered in the affirmative, the claim sounds in medical malpractice. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). Also, if the reasonableness of an action can be evaluated by a jury only after the presentation of expert testimony, the claim sounds in medical malpractice. *Id.* at 423; see also *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 46; 594 NW2d 455 (1999).

At first glance, Mary Doe's vicarious liability claim involving an alleged sexual assault does not appear to fit the mold of a commonplace medical malpractice case. However, we conclude that the claim actually raises questions of medical judgment that are beyond the realm of common knowledge and experience. *Bryant, supra*, at 422. Our Supreme Court's decision in *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45-46; 594 NW2d 455 (1999) provides guidance. In *Dorris, supra*, the plaintiff in the companion case, *Gregory v Heritage Hosp* alleged that she was assaulted by another psychiatric patient and that the hospital had breached its duties to hire employees who would protect patients from other patients with violent propensities, to closely monitor such patients, and to provide adequate staffing to control the behavior of patients under psychiatric care. *Dorris, supra* at 31, 46. In evaluating whether the plaintiff's claim sounded in negligence or medical malpractice, our Supreme Court held:

> The determination whether a claim will be held to the standards of proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment. [*Id.* at 46, citing *Wilson v Stilwill*, 411 Mich 587, 611; 309 NW2d 898 (1981).]

The Supreme Court ruled that the plaintiff's allegations regarding staffing decisions and patient monitoring involved questions of "professional medical management and not ordinary negligence" because "[t]he ordinary layman does not know the type of supervision or monitoring that is required for psychiatric patients in a psychiatric ward." *Id.* at 47.

Mary Doe's complaint raises substantially similar questions to those raised in *Dorris, supra,* involving Silverton and Silverton Skin Institute's medical judgment specifically regarding both the selection and retention of medical personnel and the monitoring and supervision of patients throughout the course of their operative and post-operative care. Mary Doe further argued that the failure to supervise and protect her was a deviation in the standard of care. We conclude that like *Dorris, supra,* questions involving the proper monitoring and supervision required by a physician for either a certified registered nurse anesthetist or a patient under general anesthesia are beyond the "realm of common knowledge and experience" of a layperson. *Bryant, supra*, at 422-423; *Dorris, supra* at 46-47. Mary Doe admits that her claim was unsupported by any affidavit of merit pertaining to Silverton and Silverton Skin Institute. To the extent that the trial court granted summary disposition to Silverton and Silverton Skin Institute on this basis, we affirm.

VI

The trial court properly denied as futile plaintiffs' motions to amend their complaints to add the claim of violation of MCL 750.411. The trial court properly granted defendants' motions for summary disposition because no evidence of a special relationship or ostensible agency existed, and no material questions of fact remain on the record. The trial court properly granted summary disposition in part because plaintiff Mary Doe failed to file affidavits of merit with respect to her claims against Silverton and Silverton Skin Institute. For these reasons, we

affirm the trial court's grant of summary disposition in favor of defendants.

Affirmed.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto

B

STATE OF MICHIGAN

COURT OF APPEALS

SHEILA LOGAN KENDRICK,

Plaintiff-Appellant,

v

RITZ-CARLTON HOTEL CO., L.L.C., and MARRIOTT INTERNATIONAL, INC.,

Defendants-Appellees,

and

FORD MOTOR LAND DEVELOPMENT CO. and MARK PAYNE,

Defendants.

UNPUBLISHED
July 27, 2006

No. 256696
Wayne Circuit Court
LC No. 02-2332542-NO

Before: Davis, P.J., Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting summary disposition to defendant Ritz-Carlton Hotel. We affirm.

I. Background

Plaintiff and her young daughter were guests of defendant hotel after a fire destroyed her home. Plaintiff moved into the hotel on September 9, 2000. On September 15, 2000, sometime in the late afternoon, a basket of fruit and cookies was delivered to plaintiff's room. A short time later, plaintiff received a phone call from a hotel employee. He identified himself as Mark Payne and asked if she had received the gift, indicating that the hotel had sent it as a condolence for the plaintiff's plight. Payne and the plaintiff talked for several minutes.

Plaintiff testified that she was ill with a headache. She took a shower. As she left the shower and was dressing, she heard a knock at her door. Believing that it was a friend, family member, or her boyfriend, plaintiff answered the door wearing a robe with only panties and bra under it. Plaintiff was startled to find defendant Payne at her door in a hotel uniform. Payne had massage oils and lotions and offered plaintiff a massage for $75. She initially declined because

she had a headache. Payne said that a massage would ease her headache, and plaintiff allowed Payne into her room.

Payne turned down the lights. Plaintiff removed her robe and laid face down on the bed. Payne proceeded to massage her temples, head, neck, and shoulders. He also massaged her back and legs but did not touch her buttocks. Plaintiff turned over and, while she was on her back, she dozed briefly. She was awakened by Payne performing oral sex on her and the simultaneous ringing of the telephone. Plaintiff pushed Payne off her and answered the call. As she talked to her boyfriend, Payne quickly left the room.

Plaintiff did not report Payne's assault for several days. She told a friend, who was a hotel employee, and a housekeeping supervisor, Clara Treadwell. Ms. Treadwell gave the plaintiff names and numbers of persons to whom Payne's misconduct might be reported. Plaintiff testified that she was concerned about her relationship with her boyfriend, very stressed about the loss of her home and her belongings, and feared going to the police because of everything else that was happening in her life. When defense counsel pressed her further, plaintiff said that she had been sexually molested as a child and that fact was a further reason that she made no report to the defendant's management or the police.

In depositions and documents defendant asserted that it was careful in hiring Payne. Defendant relied on Payne's application, a resume, and testing, and it also did extensive interviewing before Payne was hired. However, defendant's staff had discussed the need for background investigation of prospective employees for years before implementing background checks in 2002. Defendant required Payne to authorize a background check before his employment, but it did not conduct a background check. The checks that were done by defendant's staff consisted of calling a few former employers. The former employers gave only job descriptions and the dates that they employed Payne. All former employers that were contacted refused to give useful information to defendant's employees.

Other evidence showed that Payne had been convicted of a sexual offense and that he had registered as a sex offender under Michigan's Sex offenders Registration Act, MCL 28.723, before his employment by defendant.

Plaintiff's suit alleged that defendant was negligent in hiring Payne in that it knew or should have known that he had been previously convicted of a sex crime. The complaint urged that defendant either should have better trained Payne or prohibited him from contact with hotel patrons. The complaint also alleged that defendant clothed Payne with apparent authority to give massages to hotel guests and, as a consequence, put him in a position where he could assault plaintiff.

The trial court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10), stating,

> There is nothing under respondeat superior, negligent hiring or nothing else, sir, that can cause Ritz-Carlton under these factual situations to be liable for [Payne]. . . . I find no factual situation considering everything that was said that would get you to a jury. . . . I'm giving it (C)(10), no question of fact . . . .

II. Standard of Review

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed,* 470 Mich 274, 278; 681 NW2d 342 (2004). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. *Id.* A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003). When the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999).

The existence of a duty is a question of law for the court to decide. *Brown v Brown*, 270 Mich App 689, 694; ___ NW2d ___ (2006). If the question of duty involves no disputed factual issues, and the court concludes that a defendant owes the plaintiff no duty, summary disposition is proper. *Cook v Bennett,* 94 Mich App 93, 98; 288 NW2d 609 (1979). We review de novo a trial court's determination whether a defendant owes a duty toward a plaintiff. *Ghaffari v Turner Construction Co (On Remand),* 268 Mich App 460, 465; 708 NW2d 448 (2005).

III. Discussion

Plaintiff's claims against defendant are twofold: first, defendant was negligent in hiring and supervising Payne, and, second, defendant is vicariously liable for Payne's intentional tort because he was aided in its accomplishment by his agency relationship with defendant.

A. Negligent Hiring

We first discuss plaintiff's negligence claim. To prevail in a negligence claim, a plaintiff must prove four elements: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co,* 463 Mich 1, 6; 615 NW2d 17 (2000). "[A] negligence action may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Graves v Warner Bros,* 253 Mich App 486, 492; 656 NW2d 195 (2002). Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. *Moning v Alfono,* 400 Mich 425, 438-439; 254 NW2d 759 (1977). The existence of a duty depends in part on foreseeability, i.e., whether it was foreseeable that the actor's conduct may create a risk of harm to the victim. *Goldman v Phantom Freight, Inc,* 162 Mich App 472, 481; 413 NW2d 433 (1987).

> The questions of duty and proximate cause are inter-related 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 on foreseeability—whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable. [*Moning, supra* at 439.]

In determining whether a duty exists, courts consider many different variables, including:

> (1) foreseeability of the harm, (2) degree of certainty of injury, (3) existence of a relationship between the parties involved, (4) closeness of connection between the conduct and injury, (5) moral blame attached to the conduct, (6) policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. The mere fact that an event may be foreseeable is insufficient to impose a duty upon the defendant. [*Terry v Detroit,* 226 Mich App 418, 424; 573 NW2d 348 (1997) (citations omitted).]

In general, there is "no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party." *Graves, supra* at 493. "The rationale underlying this general rule is the fact that '[c]riminal activity, by its deviant nature, is normally unforeseeable.'" *Id.,* quoting *Papadimas v Mykonos Lounge,* 176 Mich App 40, 46-47; 439 NW2d 280 (1989). Social policy, however, has led courts to recognize an exception to this general rule where a "special relationship" exists between a plaintiff and a defendant. *Williams v Cunningham Drug Stores, Inc,* 429 Mich 495, 499; 418 NW2d 381 (1988). The duty to protect arising from a "special relationship" is based on control; where one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself, the duty to protect is imposed upon the person in control because he is best able to provide a place of safety. *Id.*

Although Michigan law recognizes a "special relationship" between an innkeeper and guest, *Graves, supra* at 494; *Marcelletti v Bathani,* 198 Mich App 655, 664; 500 NW2d 124 (1993), actual or constructive knowledge on the part of the defendant of some danger to be protected against is usually a critical factor in determining whether a special relationship exists. See *Samson v Saginaw Professional Bldg, Inc,* 393 Mich 393, 403-406; 224 NW2d 843 (1975). This is related to the requirement of foreseeability because foreseeability depends on knowledge. *Id.* at 405.

In *Tyus v Booth,* 64 Mich App 88, 89; 235 NW2d 69 (1975), Flozelle Nails, an employee at a service station owned by the defendant Tom Booth, committed unprovoked assaults on the plaintiffs, Bernard and Robert Tyus. Apparently, Nails had a criminal record. *Id.* at 91. However, there was no evidence that Booth actually knew of Nails' prior assault convictions. *Id.* The trial court dismissed the Tyuses' negligence action, and this Court upheld that dismissal, holding that an employer is not obliged to "conduct an in-depth background investigation of his employee" to discover whether there is a history of violent propensities. *Id.* at 92. Rather, "[t]he duty is to use reasonable care to assure that the employee *known to have violent propensities* is not unreasonably exposed to the public." *Id.* (emphasis added). Because "there was no evidence that the defendant had actual knowledge of prior assault convictions of the employee," *id.* at 91, the Court concluded that "there was no evidence from which jurors could have reasonably concluded that defendant had notice of his employee's propensity for violence," *id.* at 93.

Here, the only documentary evidence that supported plaintiff's argument that Payne's actions were foreseeable was the affidavit of John T. Adams, which states that Payne is a registered sex offender in Michigan. However, the mere fact that the sexual offender registry is a public record does not create in defendant a "legal duty to keep abreast of such records and to act

preventively upon finding . . . transgressions of [its] employee[s]." *Tortora v General Motors Corp*, 373 Mich 563, 567; 130 NW2d 21 (1964). Moreover, "the mere fact that a person has a criminal record, even a conviction for a crime of violence, does not in itself establish the fact that that person has a violent or vicious nature so that an employer would be negligent in hiring him to meet the public." *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 415; 189 NW2d 286, (1971).

The dissent disagrees with our reliance on this Court's decision in *Tyus* for several reasons, which we will address presently. While we acknowledge that *Tyus* is not binding precedent because it was decided before November 1, 1990, MCR 7.215(J)(1), we nonetheless find the Court's reasoning persuasive and applicable. Although plaintiff does not allege defendant had a duty to "conduct an *in-depth* background investigation of [its] employee," the only duty with regard to background checks that defendant was under was to take the "usual and reasonable steps before employing [Payne]." *Bradley v Stevens*, 329 Mich 556, 563; 46 NW2d 382 (1951). Here, defendant not only relied on Payne's application, resume, and testing, but it also did extensive interviewing of Payne's previous employers before hiring him. Plaintiff has presented no evidence to support her claim that such a background check was unreasonable.

Further, we do not agree that there is any significant difference between Payne's exposure to the public as a housekeeping supervisor and Nails' exposure to the plaintiff in *Tyus* such as to justify a different legal standard for their employers. The dissent emphasizes the fact that, although "Michigan law generally recognizes that innkeepers and their patrons have a 'special relationship,' . . . [g]asoline stations have no such recognized special relation ship with the public." Post at ___. Michigan courts, however, have also recognized a "special relationship" between "business invitors or merchants [and] their business invitees," *Graves*, *supra* at 494 (citations omitted), which could as easily be extended to the parties in *Tyus* as to the parties in the present case. The "special relationship" between plaintiff and a defendant, however, does not arise automatically based on the parties' status toward one another, but rather a court must determine that the circumstances are such that social policy demands it recognize the "special relationship" because the party in control is best able to provide a place of safety. See *Williams, supra* at 498-499; *Graves, supra* at 494-501, 502.

Here, although Payne may have had access to hotel room keys, which he arguably could have used to force his way in to plaintiff's hotel room,[1] he simply knocked on plaintiff's door, which any member of the public could have done. Under the circumstances of this case, plaintiff, and not defendant, was in the best position to guard against the potential harm. Thus, the entrustment to the control and protection of another and the corresponding loss of the ability to protect oneself, which provide the basis for finding a special relationship between an innkeeper and guest, *Williams, supra*, was not the basis for the alleged harm in this case. Moreover, defendant had no actual or constructive knowledge of some danger to be protected against that plaintiff did not, so as to justify the existence of a special relationship. See *Samson,*

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[1] Cf. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 224-225; 716 NW2d 220 (2006), discussing *Costas v Coconut Island Corp*, 137 F3d 46 (CA 1, 1998).

supra at 403-406. In the context of "special relationships," the "duty of reasonable care [extends] toward only those parties who are 'readily identifiable as [being] foreseeably endangered.'" *Graves*, *supra* at 494 (citations omitted). Because neither the result of defendant's hiring Payne (that he would gain entry to a guest's hotel room by offering an in-room massage and then sexually assault the guest) nor the intervening cause (that plaintiff would voluntarily allow a man carrying a basket of oils into her room to give her a massage on her bed while wearing only her bra and panties) was foreseeable, we hold that the trial court did not err in finding that there was no duty in this case. *Moning, supra* at 438-439.

Finally, we believe that the holding in *Tyus* does not conflict with the holdings in *Brown*, *supra*, or *Hersh*, *supra*. *Hersh* is factually distinguishable from both *Tyus* and the present case because, there, "the employer defendant did learn of a prior criminal record during the time of his employment." *Hersh*, *supra* at 413. As this Court stated in *Brown*,

> under *Hersh,* with respect to an employee with a criminal record, possibly even involving a "crime of violence," *about which the employer had some knowledge*, "[w]hether the employer knew or should have known of [an employee's] vicious propensities should not be determined by any court as a matter of law, but by the jury." [*Brown*, *supra* at 695 (alteration in original, emphasis added).]

In the case before us, the deposition testimony of the two hotel employees that plaintiff submitted clearly establishes that the hotel had no knowledge of Payne's prior conviction because the hotel never performed a background check. Under *Tyus, supra* at 92, the hotel had no duty to perform a background check, and knowledge of Payne's name on the sex offender registry is not imputed to it. Additionally, none of the factors in *Terry*, *supra* at 424, weigh in favor of finding a duty to do a background check under these circumstances. There simply was "no evidence from which jurors could have reasonably concluded that defendant had notice of [Payne's] propensity for violence," *Tyus, supra* at 93, and, thus, no evidence from which a jury could conclude that defendant breached its duty to plaintiff by unreasonably exposing Payne to the public.

B. Vicarious Liability

Plaintiff has also alleged that defendant is vicariously liable for Payne's intentional tort because defendant clothed Payne with apparent authority to give massages to hotel guests. Plaintiff urges that, despite Payne acting outside the scope of his employment, defendant is liable because the agency relationship between Payne and defendant aided Payne in sexually assaulting her. We disagree.

Under the doctrine of respondeat superior, the general rule is that an employer is not liable for the torts intentionally or recklessly committed by an employee when those torts are beyond the scope of the employer's business. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 221; 716 NW2d 220 (2006), citing *Bradley, supra* at 562. Specifically, an employer is ordinarily not liable for the criminal actions of an employee because those acts are outside of the scope of employment. *Salinas v Genesys Health Sys,* 263 Mich App 315, 317; 688 NW2d 112 (2004). Plaintiff relies on 1 Restatement Agency, 2d, § 219(2)(d) for the assertion that a principal is liable if the agent is aided in the accomplishment of a tort by the existence of the agency relationship. Our Supreme Court, however, flatly rejected the application of § 219(2)(d) as an

exception to the rule of respondeat superior employer nonliability. *Zsigo*, *supra* at 231. As Payne clearly acted outside the scope of his employment when he allegedly sexually assaulted plaintiff, defendant is not vicariously liable for Payne's actions.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

C

STATE OF MICHIGAN

COURT OF APPEALS

KEVIN DAUGHERTY, a Minor, by his next friend, JANICE DAUGHERTY,

Plaintiff-Appellant,

v

WILLIAM LEGROS,

Defendant,

and

CAPAC SCHOOL DISTRICT BOARD OF EDUCATION,

Defendant-Appellee.

UNPUBLISHED
April 25, 2000

No. 208127
St. Clair Circuit Court
LC No. 96-001274-NO

Before: Holbrook, Jr., P.J., and Kelly and Collins, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from an order granting defendant Capac School District Board of Education's motion for summary disposition, and from an order denying plaintiff's motion to file an amended complaint. We affirm.

This case arises out of defendant William Legros, a fourth grade teacher at Capac elementary school, sexually assaulting a student during class. Plaintiff filed suit against defendant Board of Education, claiming that it was vicariously liable for Legros' conduct. Defendant contended that governmental immunity precluded any liability, and the trial court agreed, granting summary disposition in defendant's favor. On appeal, plaintiff contends that the trial court erred as a matter of law in granting defendant Board of Education's motion for summary disposition. We review a trial court's decision to grant or deny a motion for summary disposition de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998).

Plaintiff contends that the trial court should have concluded that defendant Board of Education was not entitled to governmental immunity under MCL 691.1407(1); 3.996(107)(1) in this case because Legros sexually assaulted the student during class, an action which is not the exercise or discharge of a governmental function. In addition, plaintiff contends that the trial court should have ruled that the Board of Education was vicariously liable for Legros' acts of sexually assaulting the student during class because the boy believed that Legros was acting within his apparent authority. We reject both arguments.

MCL 691.1407(1); MSA 3.996(107)(1) states:

> Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function.

There is no intentional tort exception to governmental immunity. *Payton v Detroit,* 211 Mich App 375, 392; 536 NW2d 233 (1995). Therefore, if a plaintiff brings a cause of action against a governmental agency for an intentional tort, a court must analyze whether the governmental agency or its employees were engaged in the exercise or discharge of a governmental function at the time the intentional tort was committed to determine whether the governmental agency is entitled to governmental immunity. See *id.*

A governmental function "is an activity expressly or impliedly mandated or authorized by the constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f); MSA 3.996(101)(f). In a lawsuit alleging vicarious liability, when determining whether an employee was engaged in the exercise or discharge of a governmental function at the time he committed the intentional tort, a court must analyze the general activity of the employee, and not his specific conduct. *Payton, supra* at 392; see also *Smith v Dep't of Public Health,* 428 Mich 540, 608; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dep't of State Police,* 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). As the *Smith* Court noted, "to use anything other than the general activity standard would all but subvert the broad governmental immunity intended by the Legislature . . . . [I]t would be difficult to envision a tortious act that is a governmental function." *Id.* at 609.

Accordingly, to decide whether defendant was entitled to governmental immunity pursuant to MCL 691.1407(1); MSA 3.96(107)(1), it must be determined whether Legros was engaged in the exercise or discharge of a governmental function at the time he sexually assaulted the student. Because the appropriate inquiry involves the general activity that Legros was performing at the time he sexually assaulted the student, and not the intentional tort itself, we conclude that Legros was indeed engaged in the exercise or discharge of a governmental function. The general activity that Legros was performing at the time he sexually assaulted plaintiff was teaching elementary school students, which is expressly authorized by statute. MCL 380.1 *et seq.*; MSA 15.4001 *et seq.* An activity that is expressly authorized by statute is a governmental function. MCL 691.1401(f); MSA 3.996(101)(f). Therefore, the trial court reached the right result in concluding that defendant Board of Education was immune from liability in this case.

The trial court correctly ruled that defendant Board of Education was not vicariously liable under a theory of respondeat superior for Legros' sexual assaults during class because the assaults were outside the scope of his employment and his apparent authority. In *Bozarth v Harper Creek Bd of Ed*, 94 Mich App 351, 355; 288 NW2d 424 (1979), this Court held that a teacher's homosexual assaults on his student constituted conduct that was clearly outside the scope of the teacher's employment and the teacher's apparent authority. *Id.* Applying *Bozarth,* we conclude that because Legros was acting outside the scope of his employment and his apparent authority when he sexually assaulted plaintiff during class, the trial court did not err in ruling that defendant could not be held vicariously liable for Legros' conduct under a theory of respondeat superior.

Plaintiff also contends that the trial court abused its discretion by not allowing plaintiff to amend the complaint to add a hostile work environment sexual harassment claim against defendant Board of Education under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, for Legros' sexual assaults during class. Specifically, plaintiff contends that it would not have been futile to allow plaintiff to amend the complaint because plaintiff can establish a prima facie case of hostile work environment sexual harassment. We review a trial court's decision to grant or deny a motion to amend a complaint for an abuse of discretion. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 548 NW2d 345 (1998).

The general rule is that, when a plaintiff is seeking to amend a complaint, a trial court should freely grant leave to amend the complaint when justice so requires. MCR 2.118(A)(2); *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). However, a trial court may deny leave to amend a complaint for the following reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party, or (5) where an amendment would be futile. *Lane v Kindercare Learning Centers, Inc,* 231 Mich App 689, 687; 588 NW2d 715 (1998). An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim. *Id.*

Plaintiff suggests proof indicating only that some other school teachers, none of them administrators, managers, school board members, or other persons with the power to take disciplinary action had notice of Legros' improprieties. While it would seem that such teachers, if identifiable, were in violation of the Child Sexual Abuse Reporting Act, MCL 722.623(1) *et seq.*. such teacher indiscretions do not make the school district liable in tort for Mr. Legros' actions. Since plaintiff made the same allegations in the motion to amend the complaint that were made in opposition to defendant's motion for summary disposition, it would have been futile to allow plaintiff to amend the complaint. See *Dowerk v Oxford Charter Twp,* 233 Mich App 62, 75; 592 NW2d 724 (1998). The trial court did not abuse its discretion.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly

/s/ Jeffrey G. Collins

D

HSee Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Court of Appeals of Wisconsin.
LOLA M., Plaintiff-Appellant,
v.
CITY OF MILWAUKEE, Defendant-Respondent, Pedro Enrique-Gaitan, Milwaukee Police Department and ABC Insurance Company, Defendants.
No. 01-1624.

Feb. 19, 2002.

Appeal from a judgment of the circuit court for Milwaukee County: Stanley A. Miller, Judge. Affirmed.

Before WEDEMEYER, P.J., SCHUDSON and CURLEY, JJ.

PER CURIAM.

***1** Lola M. appeals from the circuit court judgment dismissing her claims against the City of Milwaukee, based on the court's written decision determining that the City was entitled to summary judgment. She argues that the court erred in concluding that the scope-of-employment issue she raised was appropriate for determination by summary judgment rather than by submission to a jury. She also argues that the court erred in dismissing her additional claim, under 42 U.S.C. § 1983, that the City violated her civil rights. We affirm.

I. BACKGROUND

¶ 2 L.M. brought the underlying action against the City as a result of City of Milwaukee Police Officer Pedro Enrique-Gaitan's sexual assault of her.[FN1] For the purpose of the circuit court's review of the City's motion for summary judgment on the scope-of-employment issue, the parties submitted the case to the court on stipulated facts.

FN1. L.M. originally filed her complaint against Enrique-Gaitan and ABC Insurance Company only; she added the City of Milwaukee and the Milwaukee Police Department as defendants over four months later.

Enrique-Gaitan was criminally prosecuted for his sexual assault of L.M.; this court affirmed his conviction. *See* ***State v. Enrique-Gaitan***, No. 99-1670-CR, unpublished slip op. (Wis.Ct.App. July 5, 2000), *review denied,* 2000 WI 121, 239 Wis.2d 310, 619 N.W.2d 93.

¶ 3 Those facts established that, on November 2, 1997, Enrique-Gaitan was working as a City of Milwaukee police officer when he pulled over L.M. for a traffic stop. After Enrique-Gaitan examined L.M.'s driver's license, informed her that her license plates were suspended and would need to be removed from the car, and allowed her to see her identifying information on the computer in his squad car, he instructed her to return to her car and follow him. He drove to the rear of two commercial buildings and parked his vehicle. After L.M. parked her car behind his, he "beckoned to her to come into [his] squad" and, after she entered the squad car, Enrique-Gaitan "grabbed [her] by the neck, pulled her very roughly over to him, and started kissing her on the mouth in [a] very rough manner." He also "forced [L.M.] to touch his penis through his clothing." After L.M. returned to her car, Enrique-Gaitan entered it and again "grabbed her by the neck and pulled her close to him and started kissing her on the mouth in a rough manner." Then he "grabbed her hand and pulled it over his penis on top of his clothing, placed her hand on his penis, and started rubbing his penis with her hand," and subsequently "grabbed her breast and fondled it in a very rough manner," and, after she pulled her hand away, "started rubbing his hand in between her legs, rubbing his finger over her vaginal area."

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¶ 4 The stipulated facts also established that on October 28, 1997, a man went to a City of Milwaukee police station and reported that, earlier on October 28, his girlfriend, a college security guard, was in Enrique-Gaitan's squad car when he "grabbed her hand." On October 30, 1997, two police sergeants interviewed the security guard who told them that, on several occasions, Enrique-Gaitan had "propositioned" her or "followed her and, on one occasion, may have been attempting to forcibly have her touch his genital area."

¶ 5 The stipulation also provided that the Milwaukee Police Department "has a specific policy prohibiting its officers from making unwelcome sexual advances or in any other way sexually harassing individuals, and specifically prohibits officers from requesting sexual favors or from engaging in verbal or physical conduct of a sexual nature."

*2 ¶ 6 Granting summary judgment, the circuit court, in its written decision, declared:

> Based on the undisputed facts, ... and on the language of ***Olson*** [***v. Connerly***, 156 Wis.2d 488, 457 N.W.2d 479 (1990)], this court concludes, as a matter of law, that defendant's tortious conduct was not motivated in any way by a purpose to serve his employer. From the undisputed facts, there is no indication defendant was intending to carry out his employment when he committed the tortious acts complained of. This is particularly true given the [Milwaukee Police Department] policy which prohibits such conduct. In fact, as the City notes, defendant's conduct actually undermines the City's interests.

And specifically with respect to L.M.'s claim under 42 U.S.C. § 1983, the court further declared:

> Plaintiff has put forth no evidence or argument to demonstrate that the City's policies regarding sexual harassment violated her constitutional rights. Moreover, plaintiff has not demonstrated that the City acted with "deliberate indifference." In this case, the [Milwaukee Police Department] had only one prior complaint, which [it] had begun investigating, and which occurred less than one week prior to the conduct complained of here. On this record, it cannot be said that any alleged failure to train or supervise defendant was so obvious and so likely to result in a violation of plaintiff's constitutional rights that the City can be said to have acted with "deliberate indifference."

II. DISCUSSION

¶ 7 The often-recited standards governing the determination of summary judgment are well known and need not be detailed here. Briefly, summary judgment methodology is used to determine whether a legal dispute requires a trial. ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis.2d 80, 86, 440 N.W. 825 (Ct.App.1989). A circuit court must enter summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (1999-2000).[FN2] While summary judgment is a "drastic remedy," it is appropriately granted when the material facts are undisputed and "no competing inferences can arise, and the law that resolves the issue is clear." ***Lecus v. Am. Mut. Ins. Co. of Boston***, 81 Wis.2d 183, 189, 260 N.W.2d 241 (1977). We review a trial court's summary judgment determination *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816 (1987). Here, we conclude that no competing inferences can arise from the stipulated facts, and that the law resolving the issues is clear.

> FN2. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

A. Scope of Employment

*3 ¶ 8 Whether an employee was acting within the scope of employment may be determined on summary judgment. ***Estate of Murray v. Travelers Ins. Co.***, 229 Wis.2d 819, 831, 601 N.W.2d 661 (Ct.App.1999). "[A]n employee's conduct is not within the scope of his or her employment if it is too little actuated by a purpose to serve the employer or if it is motivated entirely by the employee's own purposes (that is, the employee stepped aside from the prosecution of the employer's business to accomplish an independent purpose of his or her own)." ***Olson***, 156 Wis.2d at 499-500, 457 N.W.2d 479. Here, we conclude that the circuit court correctly determined that Enrique-Gaitan's assault of L.M. was outside the scope of his employment.

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¶ 9 L.M. submits that "[t]he issue in this case is really one of procedure, asking whether a court or jury should answer the factual question of whether or not the officer's conduct was actuated, at least in part, by a purpose to serve the employer." She reasonably suggests that the question is "one of degree: how much must an employee deviate from the employer's (pure) purpose before the employee is no longer within the scope of his employment." She argues that if this court "steps back and looks at the context of the tort herein in its entirety[,] .... it becomes evident that this was a chain of interdependent, interwoven events, of which the sexual assault and sexual battery were linked with conduct meant to serve the purpose of the employer." Although we accept L.M.'s theoretical premise-that the question is one of degree-we reject her contention that Enrique-Gaitan's assaultive behavior was linked to some service of the City.

¶ 10 L.M. presents a lengthy argument that, in effect, dissects Enrique-Gaitan's conduct in order to demonstrate that some of his actions were within the scope of his employment. She refers, for example, to his questioning of her regarding her suspended license plates, and to his display of the squad car computer indicating her previous address. In doing so, however, L.M. fails to follow her own good advice to this court-to "step[ ] back and look[ ] at the context." The fact that, in the course of his improper conduct, Enrique-Gaitan did certain things that, in isolation, were within the scope of employment is no more significant than the fact that, indeed, a broken clock tells the correct time twice each day.

¶ 11 In ***Olson***, the supreme court reiterated that "[t]he scope[-]of [-] employment cases of this court have always deemed significant the employee's intent at the time the acts in question were committed." ***Olson***, 156 Wis.2d at 497-98, 457 N.W.2d 479. Obviously, in assaulting L.M., Enrique-Gaitan was intending to serve himself, not the City; he "stepped aside from his employer's business to achieve an independent purpose of his own." *See* ***id.*** at 501, 457 N.W.2d 479. Although Enrique-Gaitan encountered L.M. while working, his assault of her was, unquestionably, not "actuated by an intent to serve his employer." *See* ***id.***

¶ 12 Thus, as the circuit court concluded, when Enrique-Gaitan assaulted L.M., he was acting outside the scope of his employment and, therefore, summary judgment was appropriate. *See* ***Block v. Gomez***, 201 Wis.2d 795, 805, 549 N.W.2d 783 (Ct.App.1996) ("[F]or a court .... to rule as a matter of law that an employee's conduct fell outside the scope of employment, the evidence presented must support only that conclusion.").

B. 42 U.S.C. § 1983

*4 ¶ 13 L.M. also briefly argues that the circuit court erred in dismissing her 42 U.S.C. § 1983 claim. She contends that because the City had received a complaint of Enrique-Gaitan's sexual assault of another woman, its "failure to engage in any affirmative act to discourage [him] from again assaulting another woman" enabled him to assault her while he was on duty, and thus is evidence of its "deliberate indifference" regarding her civil rights. She maintains:

> The City could have suspended the officer with pay; it could have transferred him (temporarily) to a desk job; it could have added a partner to his patrol. Yet, the City decided to "investigate" while its officer, already accused of serious sexual misconduct while in uniform, continued on the streets. Even if the [C]ity would have **merely notified** Enrique-Gaita[ ]n that it was **investigating him**, it probably would have deterred him for the period of the investigation. Instead the City did nothing.

¶ 14 It is undisputed that the City had received a prior complaint of Enrique-Gaitan's improper conduct against another woman. That complaint, however, came only days before the incident involving L.M. According to the stipulated facts, the complaint was investigated two days after it was received but, by the time of the L.M. assault, the investigation had not advanced to the point where the City had more directly intervened. The facts offer nothing to suggest that the City was deliberately indifferent to any allegations of misconduct.

¶ 15 "A claim of negligence in .... supervising employees does not state a cause of action under sec.1983. For such a claim to be actionable under the federal act, the failure to supervise .... must be so severe that it shows 'gross negligence' or 'deliberate indifference.' " ***Kimpton v. Sch. Dist. of New Lisbon***, 138 Wis.2d 226, 238, 405 N.W.2d 740 (Ct.App.1987) (citations omitted). "To rise to the level of 'gross negligence' or 'deliberate indifference' the evidence

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must show that the [City's] 'supervisory officials knew or should have known that [the employee was] engaging in unconstitutional conduct, and they failed to take remedial action.' " ***Id.*** at 239, 405 N.W.2d 740 (quoting ***Starstead v. City of Superior***, 533 F.Supp. 1365, 1371 n. 5 (W.D.Wis.1982)). Thus, even if we could accept L.M.'s implicit premise that the City's "supervision"-its response to the prior complaint against Enrique-Gaitan-was negligent, nothing in the facts would establish "gross negligence" or "deliberate indifference." Accordingly, we conclude that the trial court correctly granted summary judgment dismissing the § 1983 claim.

By the Court.-Judgment affirmed.

***5** This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b) 5.

Wis.App.,2002.
Lola M. v. City of Milwaukee
252 Wis.2d 768, 642 N.W.2d 646, 2002 WL 234234 (Wis.App.), 2002 WI App 85

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Michigan Civil Jurisprudence
Database updated November 2010
Counties

Tammy E. Hinshaw, J.D. and Sally J.T. Necheles, J.D., LL.M.

VI. County Liabilities
C. Tort Liability
1. In General

Topic Summary; Correlation Table; References

§ 180. County liability for officers' acts, generally

West's Key Number Digest

West's Key Number Digest, Counties 146

In the absence of statute, there is no liability on the part of a county for negligent conduct of its officers and agents.[FN1] Indeed, a statute[FN2] which merely provides a method of collecting judgment against the county if and when liability has been established cannot be construed to impose liability on the county for negligent conduct of its officers and agents.[FN3]

A county is not liable for those acts of its agents that are separate and distinct from county business.[FN4]

A county is never responsible for a sheriff's acts, except the county board of commissioners may protect the sheriff against claims by prisoners for unintentional injuries received while in his or her custody.[FN5] Thus, the sheriff's department, as an agency of the county, is excluded from liability for alleged assault and battery committed on a prisoner by a deputy sheriff. [FN6]

The statute governing the procedure for enforcement of a judgment against a county[FN7] does not apply to judgments rendered against a county sheriff, since the county is immune from liability for the actions of its sheriff. [FN8]

A county does not guarantee the integrity of its officers, nor is it legally bound to answer for their misconduct.[FN9] A county is not liable where its treasurer embezzles and loses funds which, as agent of the townships and cities of the counties, he or she is required to place to their credit.[FN10]

However, the county is chargeable with all losses by default of county officers with respect to taxes.[FN11] Additionally, every county in the State of Michigan having any such cemetery fund, must always be held accountable and liable for any and all such cemetery money in an action brought by any person having deposited such fund, or his or her heirs, or by any cemetery board, or township board, wherever the cemetery is located within the State of Michigan. [FN12]

[FN1] Miller v. Board of Road Com'rs of Manistee County, 297 Mich. 487, 298 N.W. 105, 136 A.L.R. 575 (1941) (overruled in part on other grounds by, Mead v. State, 303 Mich. 168, 5 N.W.2d 740 (1942)); Maffei v. Berrien County, 293 Mich. 92, 291 N.W. 234 (1940).

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[FN2] MCLA 600.6093 (set out in part in § 200).

[FN3] Maffei v. Berrien County, 293 Mich. 92, 291 N.W. 234 (1940).

[FN4] Moross v. Hillsdale County, 242 Mich. 277, 218 N.W. 683 (1928).

[FN5] Const. 1963, Art. 7, § 6.

[FN6] **Bayer v. Almstadt, 29 Mich. App. 171, 185 N.W.2d 40 (1970)**.

[FN7] MCLA 600.6093(3).

[FN8] Valentino v. Dohany, 138 Mich. App. 94, 359 N.W.2d 263 (1984).

[FN9] Marquette County v. Treasurer of Ishpeming, 49 Mich. 244, 13 N.W. 609 (1882).

[FN10] Marquette County v. Treasurer of Ishpeming, 49 Mich. 244, 13 N.W. 609 (1882).

For county officer performance bonds, generally, see § 118.

[FN11] MCLA 211.91.

Losses through failure of depository. MCLA 129.12.

[FN12] MCLA 128.87.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROD TELFOR and ALICE TELFOR,

Plaintiffs,

v.

DON WITTKOPP, STEVE RUSSELL, MONTCALM COUNTY SHERIFF DEPARTMENT, and UNKNOWN OFFICERS AND GOVERNMENTAL ENTITIES,

Defendants.

Case No. 1:04-CV-711

Hon. Richard Alan Enslen

OPINION

/

This matter is before the Court on Defendants Don Wittkopp, Steve Russell, and the Montcalm County Sheriff's Department's Motion for Summary Judgment. Though titled as only for summary judgment, Defendants Motion was filed pursuant to Federal Rules of Civil Procedure 12(b)(6) and 56. The Court has reviewed the filings and finds oral argument unnecessary. W.D. MICH. LCIVR 7.2(d).

I. BACKGROUND

On October 24, 2002, Defendants Don Wittkopp and Steve Russell, acting as Montcalm County Deputy Sheriffs, obtained and executed a search warrant against Plaintiffs' real property. Based on an informant's tip, Defendants believed that marijuana or other controlled substances were located there. The search warrant described the property to be searched as "353 W. Fenwick Rd. A white and brown colored two story building. This building is brick constructed and has a sign on the front that reads 'FENWICK GENERAL STORE.'" (Defs.' Br. in Supp. of Mot. for Summ. J., Ex. B). Plaintiffs were not present when the premises was searched.

The property located at 353 W. Fenwick Road is a commercial enterprise that, as the search warrant suggests, Plaintiffs operated as a general store. The general store is built out of white brick with a window front facade and partial canopy. Adjoined to this structure is a building that served as Plaintiffs' residence.[1] The residential structure is composed of brown brick and does not share the commercial structure's window front or canopy. These structures share a common wall and internal access to either structure is possible by a common door inside the structures. The residential structure also has a separate door for egress. Defendants searched both the commercial structure and the residential structure.

Plaintiffs submit that the commercial structure is addressed as 359 W. Fenwick Road and that the residential structure is addressed as 353 W. Fenwick Road. Plaintiffs did not affix a corresponding address to either structure. Plaintiffs contend that because the search warrant described the building to be searched as the structure adorned with a sign that read "FENWICK GENERAL STORE," Defendants exceeded the scope of the warrant by searching the residential structure.

II. STANDARD OF REVIEW

Deciding a motion for summary judgment requires the Court to determine if there is no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The Court must consider the record as a whole by reviewing all pleadings, depositions, affidavits and admissions on file. *Matsuhita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The facts are to be considered in a light most favorable to the non-moving party, and ". . . all justifiable inferences are to be drawn in his favor." *Schaffer v. A.O. Smith*

[1] However, Plaintiffs did not reside in the residential structure until July 2004.

Harvestore Prod., 74 F.3d 722, 727 (6th Cir. 1996) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)) (other citations omitted).

Once the movant satisfies his burden of demonstrating an absence of a genuine issue of material fact, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151, 153-54 (6th Cir. 1990). The non-moving party may not rest on its pleading but must present "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting FED. R. CIV. P. 56(e)). It is the function of the Court to decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. The question is "whether a fair-minded jury could return a verdict for the [non-moving party] on the evidence presented." *Id.* at 252. "The 'mere possibility' of a factual dispute is not enough,'" *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992) (quoting *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 863 (6th Cir. 1986)), neither is the submission of *de minimis* evidence. *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996).

Whether dismissal is proper pursuant to Federal Rule of Civil Procedure 12(b)(6) is a question of law. *Roberson v. Tennessee*, 399 F.3d 792, 794 (6th Cir. 2005); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 570 (6th Cir. 2004); *Arrow v. Fed. Reserve Bank*, 358 F.3d 392, 393 (6th Cir. 2004). The Court must construe the complaint in a light most favorable to the plaintiff, accept all the factual allegations as true, *Smith*, 378 F.3d at 568, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Roberson*, 399 F.3d at 794; *Arrow*, 358 F.3d at 393. When an allegation is capable of more than one

inference, it must be construed in the plaintiff's favor. *Saglioccolo v. Eagle Ins. Co.*, 112 F.3d 226, 228-29 (6th Cir. 1997); *Columbia Natural Res. Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995).

Although Rule 12(b)(6) clearly affords Plaintiffs some liberties, it does require more than the bare assertion of legal conclusions. *Bovee*, 272 F.3d at 361; *Gregory v. Shelby County, Tenn.*, 220 F.3d 433, 446 (6th Cir. 2000). "In practice, 'a . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.'" *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 726 (6th Cir. 1996) (quoting *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993)). With regard to their Rule 12(b)(6) dismissal arguments, the Court observes that Defendants have not asked the Court to consider matters outside of the pleadings and the Court will therefore review Defendants' dismissal arguments under Rule 12(b)(6) rather than Rule 56. *See* FED. R. CIV. P. 12(b). It is with these principles in mind that the Court turns to the merits of Defendants' Motion.

III. DISCUSSION

Plaintiffs' Complaint is brought pursuant to 42 U.S.C. § 1983, and charges Defendants with violating Plaintiffs' substantive due process rights, equal protection rights, and right to be free from illegal searches as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. Defendants' Motion for Summary Judgment assails the sufficiency of these claims. Specifically, Defendants contend that: the Montcalm County Sheriff Department is not a legal entity capable of being sued; no county custom or policy motivated a constitutional violation; and Plaintiffs' claims against the individual deputy Defendants should be dismissed. The Court will address each contention in turn.

A. The Montcalm County Sheriff Department

In *Bayer v. Macomb County Sheriff's Department*, 29 Mich. App. 171 (1970), the Michigan Court of Appeals summarily determined that as a county agency, a sheriff department could not be liable for the actions of a county sheriff or his deputies. *Id.* at 175 (citing MICH. CONST. 1963 art. VII, § 6, which provides that "[t]he county shall never be responsible for [a sheriff's] acts . . . ."). Although non-binding authority, *see Garden City Osteopathic Hosp. v. HBE Corp.*, 55 F.3d 1126, 1130 (6th Cir. 1995), *Bayer* has gained some currency in this district.

In *Hughson v. County of Antrim*, 707 F. Supp. 304 (W. D. Mich. 1988) [Hillman, J.], plaintiff named as defendants the Antrim County Sheriff Department and the Antrim County Prosecutor's Office. *Id.* at 305. The court explained that in Michigan, the sheriff's office does not exist as a separate legal entity, "[i]nstead, the sheriff and the prosecutor are individuals, elected in accordance with constitutional mandates. [MICH. CONST. 1963 art. VII, § 4]. Since the sheriff's department and the prosecutor's office do not exist, they obviously cannot be sued." *Id.* at 306; *see also Vine v. County of Ingham*, 884 F. Supp. 1153, 1158 (W.D. Mich. 1995) (holding the same under section 1983) [McKeague, J.]. Similarly, this Court finds *Bayer* and its progeny in this district persuasive. Therefore, the Court will grant Defendants' Motion on this ground and dismiss Defendant Montcalm County Sheriff's Department.

B. Montcalm County

The Court observes that Montcalm County was neither captioned nor specifically named as a Defendant in Plaintiffs' pleadings. However, Plaintiffs do make reference to Montcalm County as a possible defendant in their Complaint, (*See* Pls.' Compl. ¶¶ 5 & 8), and Montcalm County is aware, as evidenced by the instant Motion, that it may be required to answer for the allegations in

Plaintiffs' Complaint. Thus, the Court finds that the dictates of due process and notice are met and will address Montcalm County's liability. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993).

Plaintiffs believe that Montcalm County's policies or customs led to the alleged constitutional deprivations. (Pls.' Compl. ¶ 8). However, Plaintiffs have submitted no evidence to suggest that any Montcalm County policy exists or how such a policy contributed to their constitutional deprivation.[2] *See, e.g., Monell v. Dep't of Soc. Serv.*, 436 U.S. 658, 690 (1978) (municipal governments may only be sued for their own unconstitutional policies); *Marchese v. Lucas*, 758 F.2d 181, 189 (6th Cir. 1985) (relationship between a Michigan county and county sheriff department is so close as to make the county liable for sheriff's constitutional violations).

To the extent that Plaintiffs believe Defendants Wittkopp and Russell showed gross negligence, recklessness, or deliberate indifference, this theory of liability relates to Montcalm County's failure to train or supervise its law enforcement officials; however, again, Plaintiffs have submitted no evidence to support such a theory. *See, e.g., Bd. of County Comm'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 397 (1997) (no municipal corrective action in face of multiple violations); *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (inherent need for training in light

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[2] Plaintiffs contend that they have requested a copy of "the Montcalm County's policy regarding the procedure for requesting, execution of and follow-through of search warrants [and that] Plaintiffs have not been provided with a copy of that information." (Pls.' Resp. to Mot. for Summ. Disposition [sic] at 2). However, Plaintiffs have not moved for a continuance to obtain more evidence under Federal Rule of Procedure 56(f). Rule 56(f) is a discretionary device that operates out of fairness to afford the non-movant in summary judgment the opportunity to discover evidence essential to his opposition. Plaintiffs have had ample opportunity to discover the allegedly damning policy and the Court finds summary dismissal of Montcalm County is appropriate at this time. *Leatherman*, 507 U.S. at 168-69 ("federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."). Furthermore, the Court is skeptical that an explicit policy exists.

of obvious risk); *City of Oklahoma v. Tuttle*, 471 U.S. 808 (1985); *Moore v. City of Detroit*, 128 Mich. App. 491, 503 (1983) (failure to train or supervise exhibits deliberate indifference).

On either theory of municipal liability—a *Monell*-style policy or a theory of a failure to train or supervise—Plaintiffs' response to Defendants' Motion for Summary Judgment is bereft of any evidence that supports liability against Montcalm County.[3] Such a response is fatal under Rule 56(e) and summary judgment is appropriate. Therefore, the Court will dismiss Montcalm County from this action.

C. The Individual Deputy Defendants

As indicated, Plaintiffs believe that Defendants Wittkopp and Russell exceeded the scope of their search warrant when they searched the residential structure and have brought substantive due process, equal protection, and unreasonable search claims under the Fourth and Fourteenth Amendments *via* section 1983. Defendants contend that Plaintiffs' substantive due process claims should be considered only under the Fourth Amendment, rather than the Fourteenth Amendment, under the more specific provision rule. Defendants also contend they are entitled to qualified immunity on Plaintiffs' Fourth Amendment claim and that Plaintiffs have failed to state an equal protection claim. Each assertion merits individual scrutiny.

1. The More Specific Provision Rule

Plaintiffs' Complaint avers:

> That Plaintiffs, Rod Telfor and Alice Telfor's constitutionally protected rights that the Defendant deputies violated include the following:

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[3] Plaintiffs simply responded with vague references to duties and responsibilities and offer no concrete evidence for the Court to determine how Montcalm County contributed to the claimed constitutional deprivation.

> a. Their right to liberty protected by in [sic] the substantive component of the [D]ue [P]rocess [C]lause of the Fourteenth Amendment, which includes a personal right to be free from improper searches of their property;
>
> * * *

(Pls.' Compl. ¶ 13). Defendants correctly point out that the Supreme Court has

> [H]eld that where another provision of the Constitution "provides an explicit textual source of constitutional protection," a court must assess a plaintiff's claims under that explicit provision and "not the more generalized notion of 'substantive due process.'" *Graham v. Connor*, 490 U.S. 386, 395 (1989). Challenges to the reasonableness of a search by government agents clearly fall under the Fourth Amendment, and not the Fourteenth.

Conn v. Gabbert, 526 U.S. 286, 293 (1999). Plaintiffs' claim, the "right to be free from improper searches of their property," implicates only the Fourth Amendment. *Id.* Therefore, the Court will grant Defendants Motion on this ground and dismiss Plaintiffs' substantive due process claim.

2. Qualified Immunity

Qualified immunity shields government officials from monetary liability unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When determining if an officer is entitled to qualified immunity, the Sixth Circuit Court of Appeals endorses a three-part test. *Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999). First, Plaintiffs have to allege a violation of a constitutionally or statutorily protected right; second, they must be shown that the right was clearly established at the time such that a reasonable official would have understood his behavior violated that right; and third, Plaintiffs have to allege sufficient facts, and support the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established rights. *Scicluna v. Wells*, 345 F.3d 441, 445 (6th Cir. 2003).

Plaintiffs certainly enjoyed a clearly established right to be free from unreasonable search and seizure when Defendants executed their warrant. U.S. CONST. amend IV; *California v. Hodari*, 499 U.S. 621, 624-25 (1991). The most crucial question concerning Defendants' asserted immunity is whether their conduct can be considered objectively unreasonable.

The Fourth Amendment limits law enforcement officials executing a search warrant to search only within the boundaries set by the warrant. *Marron v. United States*, 275 U.S. 192, 196 (1927). Defendants contend their search of the residential structure was reasonably within the scope of their warrant because there is some confusion as to the correct addresses of the structures. According to Defendants, Plaintiffs have regarded both structures as "353 Fenwick" and indicated the same to the Internal Revenue Service through tax filings. (*See* Rod Telfor Dep. at 19). Defendants posit that because Plaintiffs themselves considered the structures to constitute a single address, and no address or markings indicated otherwise, it was objectively reasonable for Defendants to assume the structures as the single location described in the warrant.

Although the Supreme Court has noted its apprehension that officers may enlarge the limited authorization furnished by a warrant into the equivalent of a general warrant to rummage, *Minn. v. Dickerson*, 508 U.S. 366, 378 (1993) (citations omitted), this Court cannot say that in this instance Defendants' conduct during the search was objectively unreasonable or exceeded the boundaries of their warrant. *See Marilyn v. Garrison*, 480 U.S. 79 (1987). As indicated, the warrant described a two-story white and brown brick building as the location to be searched. The Fenwick General Store is a two-story white building and the adjoining residential structure appears to be a one and one-half story brown brick building. (*See* Defs.' Br. in Supp. of Mot. for Summ. J., Ex. D). Given that neither building is labeled or otherwise delineated, it was entirely reasonable for Defendants to

assume that the structures constituted the single two-story white and brown brick building described in the warrant. Furthermore, Plaintiffs have not offered any evidence to rebut Defendants' assertion that 359 W. Fenwick Road is easily confused with 353 W. Fenwick Road, nor have Plaintiffs refuted that they have at least once before interchanged the addresses, heightening the confusion. Plaintiffs simply invite the Court to find Defendants' search went beyond the scope of their warrant because "there was no testimony given to obtain the search warrant regarding a side door, or a side building involved in any drug transactions." (Pls.' Resp. to Mot. for Summ. Disposition [sic] at 8). While this may or may not be true, it does little to dispute Defendants' common understanding that the structures (353 W. Fenwick and 359 W. Fenwick) were regarded as a single address and single structure. The Court finds that Defendants' search was objectively reasonable given that neither structure was marked and both structures were described in the warrant. Therefore, Defendants are entitled to qualified immunity and summary judgment on that point.

3. Failure to State an Equal Protection Claim

Defendants maintain that Plaintiffs have failed to allege an equal protection claim. On this score, Plaintiffs' Complaint reads as follows:

> That Plaintiffs, Rod Telfor and Alice Telfor's constitutionally protected rights that the Defendant deputies violated include the following:
>
> * * *
>
> The right to fair and equal treatment guaranteed and protected by the equal protection clause of the Fourteenth Amendment.

(Pls.' Compl. ¶ 13). When forced to elaborate on their claim by the dismissal portion of Defendants' Motion, Plaintiffs articulate their claim as "Defendant Wittkopp discriminated against Plaintiff and

labeled him as a career criminal for purposes of obtaining a search warrant . . . ."[4] (Pls.' Resp. to Mot. for Summ. Disposition [sic] at 9). Although Defendants will likely assert a host of rational reasons to defeat this claim, the Court cannot equivocally conclude that Plaintiffs can prove no set of facts in support of their equal protection claim. *See, e.g., Oyler v. Boles*, 368 U.S. 448, 456 (1962) (and cases cited therein). Thus, the Court will deny Defendants' motion seeking dismissal.

IV. CONCLUSION

Therefore, the Court will grant in part and deny in part Defendants Don Wittkopp, Steve Russell, and Montcalm County Sheriff's Department's Motion to for Summary Judgment. A Partial Judgment consistent with this Opinion shall issue.

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
SENIOR UNITED STATES DISTRICT JUDGE

DATED in Kalamazoo, MI:
December 7, 2005

[4] Plaintiff does not indicate whether Rod or Alice Telfor was so labeled.