STATE OF MICHIGAN

COURT OF APPEALS

ASHLEY O'NEAL and JEREMY O'NEAL,

Plaintiffs-Appellants,

v

MCC MECOSTA, LLC, MCC MECOSTA TULLYMORE RESORT, LLC, MCC GOLD COURSES, LLC, and MCC HOLDINGS, LLC,

Defendants-Appellees,

and

DANIEL CARLSON,

Defendant.

UNPUBLISHED
January 26, 2023

No. 356766
Mecosta Circuit Court
LC No. 18-024686-NI

Before: RICK, P.J., and BOONSTRA and O'BRIEN, JJ.

PER CURIAM.

Plaintiffs, Ashley O'Neal and Jeremy O'Neal, appeal by leave granted[1] an order granting summary disposition under MCR 2.116(C)(10) to defendants MCC Mecosta, LLC; MCC Mecosta Tullymore Resort, LLC; MCC Gold Courses, LLC; and MCC Holdings, LLC (collectively, "defendants"). We affirm.

I. BACKGROUND

In 2015, Daniel Carlson became a co-general manager of the Tullymore Golf Resort in Mecosta County. Carlson's aunt, Joann Ministrelli, was the other co-general manager. Defendants, along with Joann's husband, Peter Ministrelli, owned the resort. Carlson was

[1] See *O'Neal v Carlson*, unpublished order of the Court of Appeals, entered August 10, 2021 (Docket No. 356766).

convicted of sexually assaulting a guest at the resort during a Halloween party on October 29, 2016. As stated in *People v Carlson*, 332 Mich App 663, 666; 958 NW2d 278 (2020):

> [Carlson] was a member of the State Bar of Michigan and was a manager of the Tullymore Resort in Mecosta County prior to his conviction in this matter. The victim . . . knew [Carlson] through her career in real estate and attended a Halloween party at the resort in 2016. In the hours after that party, [Carlson] digitally penetrated the victim's vagina while she was so intoxicated that she could not speak, move, or feel.

After the criminal case, plaintiffs sued Carlson for committing the sexual assault and sued defendants under theories of negligence and respondeat superior. The trial court granted summary disposition to defendants,[2] concluding that they had had no reason to foresee that Carlson would commit a sexual assault. This appeal followed.

II. STANDARD OF REVIEW

On appeal, plaintiffs contend that the trial court erred by granting defendants' motion for summary disposition, arguing that they presented a genuine issue of material fact regarding whether the assault was foreseeable.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spohn v Van Dyke Pub Schs*, 296 Mich App 470, 479; 822 NW2d 239 (2012). Defendants moved for summary disposition under MCR 2.116(C)(10). As explained by our Supreme Court:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any 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).]

III. ANALYSIS

Employers are generally not liable for the criminal acts of their employees. See *Brown v Brown*, 478 Mich 545, 554; 739 NW2d 313 (2007); *Hamed v Wayne Co*, 490 Mich 1, 11-12; 803 NW2d 237 (2011). There are, however, exceptions to this rule. An employer may be liable in negligence for an employee's criminal conduct if the employee's particular criminal conduct was reasonably foreseeable, such as if the employee had committed similar criminal conduct in the past, see *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412-414; 189 NW2d 286 (1971), or if the employee "clearly and unmistakably threaten[ed] particular criminal conduct that would have put a reasonable employer on notice of an imminent risk of harm to a specific victim," *Brown*, 478 Mich at 555. Similarly, an employer can be liable for its employee's criminal conduct under a

[2] The case against Carlson remains pending.

theory of respondeat superior if the "employer had (1) actual or constructive knowledge of prior similar conduct and (2) actual or constructive knowledge of the employee's propensity to act in accordance with that conduct." *Hamed*, 490 Mich at 12. Thus, for defendants to be liable to plaintiffs for Carlson's criminal conduct under either a theory of negligence or respondeat superior, plaintiffs were required to demonstrate that defendants had knowledge that rendered Carlson's specific criminal conduct reasonably foreseeable.

Our state's caselaw demonstrates that this is not an easy task. In *Brown v Brown*, 478 Mich 545, 547; 739 NW2d 313 (2007), the Michigan Supreme Court considered whether a manufacturer could be held liable for an employee's rape of a contracted security guard at the manufacturing plant. The guard alleged that, before the rape, the employee had routinely made vulgar, offensive sexual comments to her—like telling her "how he loved [her] long hair and how he would want to f**k [her] and pull [her] long hair"—and that she had reported the comments to a plant manager. *Id*. at 549 & n 3. The guard sued the manufacturer on theories of respondeat superior and negligence, although only the negligence theory was discussed on appeal. *Id*. at 550 & n 6. The circuit court granted summary disposition to the manufacturer. *Id*. at 550. The guard appealed, and this Court reversed, determining that the evidence was sufficient to create a question of fact regarding whether the manufacturer knew or should have known of the employee's violent propensities. *Id*. at 551. The Michigan Supreme Court reversed this Court's decision and affirmed the grant of summary disposition to the manufacturer. *Id*. at 548. The Supreme Court determined that the manufacturer owed no duty to the guard to prevent the rape because the manufacturer had no notice of the employee's propensity to rape. *Id*. at 552. The Court explained:

> [A]n employer can assume that its employees will obey our criminal laws. Therefore, it cannot reasonably anticipate that an employee's lewd, tasteless comments are an inevitable prelude to rape if those comments did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a specific victim. Comments of a sexual nature do not inexorably lead to criminal sexual conduct any more than an exasperated, angry comment inexorably results in a violent criminal assault. [*Id*. at 555.]

The Court recognized that if the manufacturer's employee "had threatened to rape [the guard] and [the manufacturer] was aware of these threats and failed to take reasonable measures in response," then the manufacturer could be liable. *Id*. The Court, however, cautioned against transforming "the test of foreseeability into an 'avoidability' test that would merely judge in hindsight whether the harm could have been avoided." *Id*. at 556. The Court emphasized that the employee's "foul and unwanted sexual comments" perhaps demonstrated a propensity "to continue to harass women," but was "not evidence of a propensity to commit violent rape" for which the manufacturer could be held liable. On this point, the Court elaborated: "It simply cannot be the responsibility of the employer to determine with clairvoyant accuracy whether conduct of one sort might bear some relationship to conduct of a completely different sort." *Id*. at 563. The Court accordingly concluded that the manufacturer was not liable because it "could not reasonably have anticipated that [the employee's] vulgarities would culminate in a rape." *Id*. at 566.

Likewise, in *Mueller v Brannigan Bros Restaurants & Taverns LLC*, 323 Mich App 566, 569; 918 NW2d 545 (2018), this Court held that an employer—a bar—was not liable for the criminal acts of its bouncer-employees because, despite the bouncers' history of aggressive

behavior, their criminal conduct was not reasonably foreseeable. The plaintiff's decedent in *Mueller* had been chased from a bar and fatally beaten by the bar's bouncers. *Id*. at 569. In reasoning that the bar was not liable under a theory of negligence, this Court stated:

> [The] claims [of negligent retention, training, and supervision] . . . depend on the particular misconduct complained of being foreseeable. Taken entirely at face value, plaintiff argues that there were frequently fights at the bar, that employees received no training, that the owner was drunk and irresponsible, and that the security staff had a tendency toward roughness and aggressiveness. We accept for the sake of argument that [the bar's] training and supervision were grossly incompetent or nonexistent. That would strongly suggest that sooner or later a patron was going to get hurt fighting with the staff on-site or while being removed from the premises. But that would still not predict security staff chasing an ejected patron down the street and beating him fatally. That outrageous conduct and loss of self-control is such a radical departure from expected social norms that we very much doubt businesses commonly perceive a need to craft rules and training against that degree of blatantly criminal misconduct. [*Id*. at 577-578.]

This Court accordingly concluded that the bar was not liable under any theory of negligence because "nothing in the [employees'] backgrounds would have suggested any serious likelihood that they would commit the complained-of acts," and "because, although it does appear that the bar was poorly run, the history of its internal issues would not predict this particular kind of misconduct." *Id*. at 579.

Similarly, in *Hamed*, 490 Mich at 5-6, the Michigan Supreme Court held that defendant Wayne County was not liable under a theory of respondeat superior for the acts of a deputy who sexually assaulted the plaintiff while the plaintiff was an inmate in custody. The Court reasoned that, while the deputy had a history of aggression and misconduct, it was not reasonably foreseeable that he would sexually assault the plaintiff. *Id*. at 16. It explained:

> Some of the grievances filed against [the deputy] reflected more serious behavior, such as using a police vehicle without authorization to deliver baby formula to his home, allegedly making threatening calls to his landlord after receiving an eviction notice, and engaging in a physical altercation with a male inmate after an exchange of words. Viewed in the light most favorable to plaintiff, this past misconduct put defendants on notice of [the deputy's] irresponsible and aggressive tendencies, which, at most, demonstrates that defendants were aware that [the deputy] had a propensity to disobey work-related protocol and engage in aggressive behavior when provoked. Defendants had no actual or constructive knowledge of prior similar criminal sexual misconduct. Even the incident of aggression did not put defendants on reasonable notice that [the deputy] would sexually assault an inmate; violent actions do not inevitably lead to acts of criminal sexual conduct. Because [the deputy's] prior misconduct was not similar to the violent sexual assault he perpetrated against plaintiff, we hold that defendants may not be held vicariously liable for quid pro quo sexual harassment based on [the deputy's] unforeseeable criminal act under traditional principles of respondeat superior. [*Id*. at 15-16 (footnotes omitted).]

Turning to the case at issue, in granting summary disposition to defendants, the trial court relied heavily on *Brown* and *Mueller*. We agree with the trial court that summary disposition was appropriate under the authority of those cases and also under *Hamed*. Plaintiffs presented evidence of complaints about Carlson that were communicated to Joann—who, according to testimony and plaintiffs' admissions, was the de facto runner of the business—but the complaints were generally related to his partying, excessive drinking, and lingering, not to anything pointing to sexual assault. While one woman spoke of Carlson following her upstairs to her condominium during a golf outing that was held weeks before the Halloween party, there is no evidence in the record that anything about that golf outing was ever reported to anyone at Tullymore. Plaintiffs contend that "Carlson was using his role and position at Tullymore Resort to provide excessive alcohol and lodging to women"—referring to Carlson's providing free room upgrades for female guests—"making it predictable that he intended to take advantage of the very women he intoxicated." But nothing about providing free alcohol or complimentary room upgrades made it foreseeable that Carlson would sexually assault a guest; such conduct is not similar to sexual assault, nor does it suggest a propensity to commit sexual assault.[3]

Plaintiffs cite *Hersh v Kentfield Builders, Inc*, 385 Mich 410; 189 NW2d 286 (1971), arguing that it supports their position on appeal. The plaintiff in *Hersh* was a fixture salesperson who had gone to a model home to meet with a builder. *Id*. at 411. While the plaintiff was on the building site, he was attacked and seriously injured by a laborer who had a prior conviction for manslaughter. *Id*. at 411-412. The plaintiff sued the builder, and the jury returned a verdict in favor of the plaintiff. *Id*. at 412. This Court reversed, holding that there was no evidence that the employer-builder knew of the laborer's violent propensities. *Id*. On appeal from this Court's decision, the Michigan Supreme Court reinstated the jury verdict in favor of the plaintiff. *Id*. at 416. The Supreme Court noted that the employer-builder had learned during the laborer's employment of the laborer's prior manslaughter conviction. *Id*. at 413. The Court stated the applicable law as follows: "An employer who knew or should have known of his employee's propensities and criminal record before commission of an intentional tort by employee upon customer who came to employer's place of business would be liable for damages to such customer." *Id*. at 412 (quotation marks and citation omitted).

Unlike in *Hersh*, nothing in this case suggests that defendants knew that Carlson had a criminal history from which they could infer he would commit a sexual assault. Similarly, nothing suggests that Carlson had ever engaged in an uncharged sexual assault before the assault at issue, or that he had ever threatened to sexually assault someone. The front-desk manager, Lorraine B., testified at her deposition that she never received any specific complaints that Carlson targeted women:

> *Plaintiffs' counsel*. Were there any specific complaints that—that [Carlson] would target women?

[3] Even accepting for the sake of argument plaintiff's contention that Carlson gave women free alcohol and room upgrades in hopes of seducing them, such conduct—as inappropriate as it may be—is still not similar to sexual assault, nor does it suggest a propensity to commit sexual assault.

> *Lorraine*. Not to my knowledge. Not towards me. I know there was [sic] women that were uncomfortable and they would complain about it. But otherwise, no.

Lorraine said that the women were uncomfortable that Carlson would "linger," but she had never seen Carlson assault anyone and had never (before the Halloween-party incident) "heard of him sexually assaulting anybody." Given that the record in this case contains no evidence that Carlson had engaged in or attempted a sexual assault before the assault at issue, nor any evidence from which a reasonable employer could infer that Carlson had a propensity for sexually assaulting others, plaintiffs' reliance on *Hersh* is unpersuasive. The present case is more analogous to *Mueller*, 323 Mich App at 577-578, *Brown*, 478 Mich at 566, and *Hamed*, 490 Mich at 15-16, in that plaintiffs presented evidence of Carlson's negative behaviors, but a reasonable employer could not predict from those behaviors that its employee would engage in the specific criminal conduct at issue—here, a sexual assault.[4]

Plaintiffs make an argument about a drugging rumor that Lorraine referred to during her testimony, asserting that it supports their claims. But Lorraine's testimony on this point was extremely vague. The following colloquy occurred:

> *Defendants' counsel*. You are not personally aware of any alleged drugging—
>
> *Lorraine*. No.
>
> *Defendants' counsel*. —by Mr. Carlson—
>
> *Lorraine*. No.
>
> *Defendants' counsel*. —correct? Do you have any recollection of someone saying that? Specifically, who?
>
> *Lorraine*. No.
>
> *Defendants' counsel*. Okay. Do you—I think—are you positive that you told [Don Williams, the chief-operating officer] that there was drugging or were these just general complaints?
>
> *Lorraine*. General complaints.
>
> *Defendants' counsel*. It was not [about] drugging?
>
> *Lorraine*. That he was putting drugs in drinks?

[4] Lorraine testified that she disliked that Carlson had rubbed her back and shoulders, but it does not appear that this was ever communicated to Joann or defendants. Regardless, even assuming that it was communicated to Joann, this conduct was not predictive of a sexual assault.

Defendants' counsel. Yeah.

Lorraine. That was being told.

Defendants' counsel. All right.

Lorraine. And it was brought to Don's attention that that's what we heard.

Defendants' counsel. Okay. When—when did this happen?

Lorraine. I don't know.

Defendants' counsel. You—but again, you don't have any personal knowledge of that?

Lorraine. No.

Lorraine said that she might have spoken with Williams about this in early 2017.[5] She said that it was not possible that the conversation occurred after the news about the Halloween-party incident broke, but then quickly amended this by saying, "I just—I don't know."

The lower court reasoned that "a rumor alone cannot prove or establish a propensity for sexual violence," adding that "[t]he rumor could still be based on nothing and reporting the rumor gives it no more credibility than when it was overheard by [Lorraine]." The court indicated that the rumor was too speculative to be given to a trier of fact. We agree with the trial court and conclude that it properly declined to give credence to the "rumor" testimony. First, as a general matter, an employer should not have to run its business on the basis of a rumor. A rumor is, by definition, a story of uncertain or doubtful truth. Given that employers are entitled to assume that their employees "will obey our criminal laws," *Brown*, 478 Mich at 555, it would be unreasonable to hold employers liable for an employee's criminality on the basis of only rumored conduct. Second, we agree with the trial court that the rumor evidence was too speculative to be given to a trier of fact— the testimony from Lorraine was that unknown persons said that Carlson was putting drugs in unknown people's drinks.[6] Finally, and relatedly, Lorraine could not even say when her

[5] Lorraine stated that Williams "would tell [Joann]" about goings-on at Tullymore. The "reporting chain" at Tullymore went from Williams to Joann. Williams testified that he did not recall Lorraine having brought to his attention any rumors that Carlson had drugged people. He said that it was his normal practice to report to Joann any issues at Tullymore and that if someone had told him about drugging, he would have told her.

[6] The "rumor" evidence was not, at the point of Lorraine's testimony, being offered for the truth of the matter asserted but rather to demonstrate that defendants should have taken some sort of action on the basis of the rumor. We note, however, that the rumor evidence would only be relevant to whether Carlson had a propensity for sexual assault if it was offered as hearsay, i.e., to establish the truth of the matter asserted. *If* Carlson was drugging guests' drinks as rumored, *then* it may be reasonably foreseeable that he would sexually assault an unconscious guest.

reporting of the rumor to Williams occurred, meaning that a trier of fact would have to speculate to conclude that the reporting occurred before the Halloween-party incident.

Accordingly, to summarize, while plaintiffs have presented admissible evidence that Carlson engaged in inappropriate conduct that made guests uncomfortable, nothing about that conduct made it reasonably foreseeable that Carlson would sexually assault a guest. As our Supreme Court explained, "[i]t simply cannot be the responsibility of the employer to determine with clairvoyant accuracy whether conduct of one sort might bear some relationship to conduct of a completely different sort." *Brown*, 478 Mich at 563. Plaintiff's entire argument rests on the idea that, in hindsight, Carlson's inappropriate conduct can be pieced together in a way that suggests the sexual assault in this case was foreseeable, and that defendants should have pieced the information together and then acted to avoid the sexual assault. Such an argument runs directly against our Supreme Court's directive that courts must avoid transforming "the test of foreseeability into an 'avoidability' test that would merely judge in hindsight whether the harm could have been avoided." *Id*. at 556. Put simply, defendants could not reasonably have anticipated that Carlson's conduct—his partying, excessive drinking, lingering, or giving guests complimentary alcohol and room upgrades—would culminate in a sexual assault.[7]

In a last-ditch effort, plaintiffs make an argument premised on *Radtke v Everett*, 442 Mich 368; 501 NW2d 155 (1993), a hostile-work-environment case brought under the Elliott-Larsen Civil Rights Act, MCL 37.210 *et seq*. In that case, our Supreme Court stated, "The final element of a hostile work environment case—respondeat superior—is met by plaintiff because the alleged perpetrator was her employer." *Id*. at 396. The Court went on:

> An employer, of course, must have notice of alleged harassment before being held liable for not implementing action. However, if an *employer* is accused of sexual harassment, then the respondeat superior inquiry is unnecessary because holding an employer liable for personal actions is not unfair.

[7] Plaintiffs attempt to analogize this case to cases involving notorious sexual offenders like Dr. Larry Nassar. With the attempted analogy, plaintiffs argue that, as a matter of public policy, this Court should clarify that Michigan law protects people from "institutional sexual assault." Plaintiffs appear to be arguing that this Court should broaden the holdings of *Brown* and *Mueller* and make it easier, in general, for a plaintiff to establish an employer's constructive knowledge of an employee's propensity to commit sexual assault. We are unpersuaded that such an expansion of our caselaw is consistent with the public policy of this state, particularly given that our Supreme Court's holdings in *Brown* and *Hamed* extensively explained why public policy favored limiting an employer's liability for the criminal conduct of its employees. See *Brown*, 478 Mich at 556-558; 562-565, and *Hamed*, 490 Mich at 14-15. See also *Brown*, 478 Mich at 566-570 (MARKMAN, J., concurring) (explaining the myriad of difficult questions employers would face if their liability for employees' criminal conduct was not limited to criminal conduct that was reasonably foreseeable). Regardless, this Court is bound by *Brown*, *Hamed*, and *Mueller*, and the trial court properly applied them.

> In the instant case, the record clearly reveals that Everett, individually, as well as defendant Clarke–Everett Dog and Cat Hospital, were employers of plaintiff. They possessed the ability to hire and fire plaintiff and to control her working conditions, maintained her discipline, paid her wages, and owned the corporation that employed her. [*Id*. at 397 (citations omitted).]

Plaintiffs ask this Court to conclude that, like in *Radtke*, because Carlson was a part owner of defendants, "the respondeat superior requirement is met ***regardless*** of the lack of any prior complaint."

While there are a number of problems with plaintiffs' reliance on *Radtke*, we need not go through them all, given the most glaring problem: there is no question of material fact that Carlson was not a part owner of defendants at the time of the assault. Plaintiffs seem to recognize the weakness of their stance, hedging that Carlson was "at a minimum the general manager . . . but more likely a member/owner." At this stage in the proceedings, plaintiffs cannot rely on "likelihood" but must provide proof supporting their claims.[8] *Karbel v Comerica Bank*, 247 Mich App 90, 96-97; 635 NW2d 69 (2001). Plaintiff's only "proof" of Carlson's ownership interest is this statement that defendants made below:

> Though irrelevant to [p]laintiffs' claims, . . . [d]efendants note for completeness that Mr. Carlson became a member with a minority ownership of MCC Holdings, LLC in November of 2016. That agreement was executed in November of 2016, and listed an effective date of 1/1/2016.

Obviously, an ownership interest executed in November 2016 (even if it listed an effective date of January 2016) would mean that on the dates of the alleged complaints and assault (which occurred in late October 2016), Carlson was not yet an owner.[9]

Affirmed.

/s/ Michelle M. Rick
/s/ Mark T. Boonstra
/s/ Colleen A. O'Brien

[8] Plaintiffs have not made an argument on appeal that discovery was incomplete or that further discovery was likely to show that Carlson was, in fact, a part owner of defendants.

[9] Other problems with plaintiffs' argument include that, unlike this case, *Radtke* was based on statutory civil-rights law and an employer/employee relationship, and that plaintiffs concede in their brief that complaints about Carlson could have been made to Joann or other owners like Peter who could have addressed the concerns.