NEW MEXICO LAW REVIEW

Volume 10
Issue 2 *Summer 1980*

Summer 1980

Torts - Negligent Hiring and Retention - Availability of Action Limited by Foreseeability Requirement

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TORTS—NEGLIGENT HIRING AND RETENTION—AVAILABILITY OF ACTION LIMITED BY FORESEEABILITY REQUIREMENT. *F & T Co. v. Woods,* 92 N.M. 697, 594 P.2d 745 (1979).

In *F & T Co. v. Woods,*[1] the New Mexico Supreme Court joined a growing number of courts in other jurisdictions[2] which recognize causes of action against an employer for negligent hiring and retention of employees.[3] However, the court severely limited their scope. This Note reviews the Supreme Court's treatment of these tort con-

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1. 92 N.M. 697, 594 P.2d 745 (1979).

2. Becken v. Manpower, Inc., 532 F.2d 56 (7th Cir. 1976); Kendall v. Gore Properties, 236 F.2d 673 (D.C. Cir. 1956); Argonne Apartment House Co. v. Garrison, 42 F.2d 605 (D.C. Cir. 1930); Fleming v. Bronfin, 80 A.2d 915 (D.C. Mun. Ct. App. 1951); Svacek v. Shelley, 359 P.2d 127 (Alaska 1961); Mallory v. O'Neil, 69 So. 2d 313 (Fla. 1954); Rosenberg v. Packerland Packing Co., 13 Ill. 208, 370 N.E.2d 1235 (1977); Tathum v. Wabash Ry. Co., 42 Ill. 568, 107 N.E.2d 735 (1952); Murray v. Modoc State Bank, 181 Kan. 642, 313 P.2d 304 (1957); Hersh v. Kentfield Builders, Inc., 385 Mich. 410, 189 N.W.2d 286 (1971); Bradley v. Stevens, 329 Mich. 556, 46 N.W.2d 382 (1951); Priest v. F. W. Woolworth Five & Ten Cent Store, 228 Mo. Ct. App. 23, 62 S.W.2d 926 (1933); Stevens v. Lankard, 31 A.D.2d 602, 297 N.Y.S.2d 686 (1968), *aff'd,* 25 N.Y.2d 640, 254 N.E.2d 339, 306 N.Y.S.2d 257 (1969); Vanderhule v. Berinstein, 285 A.D. 290, 136 N.Y.S.2d 95 (1954), *modified,* 284 A.D. 1089, 136 N.Y.S.2d 349 (1954); Mistletoe Express Serv., Inc. v. Culp, 353 P.2d 9 (Okla. 1960); Stone v. Hurst Lumber Co., 15 Utah 2d 49, 386 P.2d 910 (1963); LaLone v. Smith, 39 Wash. 2d 1967, 234 P.2d 893 (1951). *See also* Restatement (Second) of Torts § 302B, Comment e, example D (1965), where this type of liability is recognized "where the actor has brought into contact or association with the other person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct."

3. The theory of negligent hiring emerged from the fellow servant rule which imposed a duty on the employer to hire employees capable of performing their work without endangering fellow employees. This rule was extended to include an employer's duty to exercise reasonable care for the safety of members of the general public who come in contact with his employees. Restatement (Second) of Agency § 213 (1957); Annot., 34 A.L.R.2d 372, 390 (1954). To fulfill this duty the employer must use due care to avoid selecting or retaining an employee whom he knew or should have known is unfit to deal with the employer's customers, patrons, or other invitees. *Id. See* Restatement (Second) of Agency § 213, Comment d (1957). Note too that the scope of persons to whom the employer owes this duty of reasonable care has been expanding through case law. *See* Fleming v. Brofin, 80 A.2d 915 (D.C. Mun. Ct. App. 1951) (where the court held that the employer owed a duty to customers who might come in contact with an employee away from the place of business, to hire and retain safe employees); Svacek v. Shelley, 359 P.2d 127 (Alaska 1961) (where the court held that an employer-landlord owed a duty to a tenant and other members of the public, while on the premises of the employer, to hire and retain safe and competent employees); Priest v. F. W. Woolworth Five & Ten Cent Store, 228 Mo. App. 23, 62 S.W.2d 926 (1933) (where the court held that an employer—retail store owner owed a business invitee a duty to use ordinary care in the selection of employees).

cepts in *Woods* and discusses the policy concerns which might have influenced the court's decision.

PROCEDURE

On August 30, 1973, Sanders, in the course of his employment, delivered a television set to the home of Ann Woods.[4] Two days later, Sanders returned to Woods' home and raped her.[5] At the time of his employment by defendant, Sanders was on parole from the New Mexico State Penitentiary where he had previously served ten years of a life sentence for unarmed robbery, kidnapping, and child rape.[6] Sanders had been hired by Houliston, F & T's hiring agent, who knew that Sanders was on parole for unarmed robbery.[7] Houliston also may have known that Sanders was on parole from kidnapping and child rape convictions.[8] Evidence also showed that before Woods was raped, Houliston might have been aware that Sanders was under investigation in a rape case.[9]

Woods alleged that F & T Company was negligent in hiring and in retaining Sanders as a deliveryman because defendant "knew or should have known" of Sanders' dangerous propensities.[10] The first trial resulted in a hung jury and mistrial.[11] In the second trial, the jury returned a verdict for plaintiff and awarded damages of $48,100.[12] On appeal, the New Mexico Court of Appeals reversed the trial court's judgment on the negligent hiring theory.[13] The court of appeals concluded that it should not have been submitted to the jury.[14] It also concluded that there was sufficient evidence to submit the negligent retention theory to the jury, and remanded the case for a new trial on that issue.[15]

On review, the New Mexico Supreme Court affirmed the court of

4. F & T Co. v. Woods, 92 N.M. at 698, 594 P.2d at 746.

5. *Id.*

6. Woods v. F & T Co., 17 N.M. St. B. Bull. 2730 (Ct. App. Sept. 7, 1978).

7. *Id.* at 2731. There were disputes concerning to whom Houliston had talked about Sanders, and what he knew.

8. Though disputed at trial, the court of appeals accepted, for purposes of reviewing the sufficiency of the evidence submitted to the jury, the inference that Houliston knew of Sanders' conviction of child rape. 17 N.M. St. B. Bull. at 2731-32.

9. *Id.* at 2743.

10. 92 N.M. at 699, 594 P.2d at 747.

11. Brief for Appellee in Support of a Motion for Rehearing, at 1, Woods v. F & T Co., 17 N.M. St. B. Bull. 2730 (Ct. App. Sept. 7, 1978).

12. *Id.*

13. Woods v. F & T Co., 17 N.M. St. B. Bull. 2730 (Ct. App. Sept. 7, 1978).

14. *Id.* at 2743.

15. *Id.* at 2744.

appeals' dismissal of the claim for negligent hiring, but reversed its decision that there was sufficient basis for finding the defendant guilty of negligent retention. The case was remanded for the entry of judgment for defendant.[16]

RATIONALE

In *F & T Co. v. Woods,* the New Mexico Supreme Court recognized both negligent hiring and negligent retention as valid causes of action and applied the "knew or should have known" standard of liability.[17] The court acknowledged that a factual issue had been raised as to whether Houliston had exercised ordinary care in selecting Sanders as a deliveryman, but concluded that his failure to inquire about Sanders' background had not been established as the proximate cause of plaintiff's injury.[18]

The court equated foreseeability with proximate cause and held that "their applicability is the same,"[19] thereby apparently limiting liability to that which is foreseeable. The *Uniform Jury Instruction* definition of proximate cause,[20] cited approvingly by the court, does not contain the foreseeability limitation; the court relied on the case of *Bouldin v. Sategna,*[21] however, to demonstrate that a lack of foreseeability can limit liability. The defendant in *Bouldin* left the keys in his truck, which was subsequently stolen and involved in an accident. The supreme court held in *Bouldin* that, as a matter of law, no proximate cause existed between the negligent act of leaving the keys in the truck and the accident because the accident was not

16. F & T Co. v. Woods, 92 N.M. at 699, 594 P.2d at 747.

17. The "knew or should have known" standard has been used in a great number of negligent hiring and retention cases. Application of the "knew or should have known" standard becomes a question for the jury. The jury must determine whether an employer was negligent because he had sufficient actual or constructive knowledge of the employee's dangerousness. Svacek v. Shelley, 359 P.2d 127 (Alaska 1961); Mallory v. O'Neil, 69 So. 2d 313 (Fla. 1954); Stricklin v. Parsons Stockyard Co., 192 Kan. 360, 388 P.2d 824 (1964); Bradley v. Stevens, 329 Mich. 556, 46 N.W.2d 382 (1951); Vanderhule v. Berinstein, 285 A.D. 290, 136 N.Y.S.2d 95 (1954), *modified,* 284 A.D. 290, 136 N.Y.S.2d 349 (1954). *Contra,* Dantos v. Community Theatres Co., 90 Ga. App. 195, 82 S.E.2d 260 (1954).

18. 92 N.M. at 701, 594 P.2d at 747.

19. *Id.* at 700, 594 P.2d at 748.

20. N.M.U.J.I. Civ. 12.10, which provides: "The proximate cause of an injury is that which in a natural and continuous sequence . . . produces the injury, and without which the injury would not have occurred."

21. 71 N.M. 329, 378 P.2d 370 (1963). Two other cases, Marchiando v. Roper, 90 N.M. 367, 563 P.2d 1160 (1977) and Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966), were cited by the supreme court to illustrate a situation where liability was denied due to a lack of proximate cause. In *Marchiando,* however, the court indicated it was bound by common law to find no proximate cause, but indicated it would act to impose liability in the future if the legislature failed to address the question. 90 N.M. at 369, 563 P.2d at 1162.

reasonably foreseeable by the defendant.[22] The court acknowledged in *Bouldin* that the determination of foreseeability is ordinarily a question of fact for the jury, but added, "where reasonable minds cannot differ, the question is one of law to be resolved by the judge."[23]

The court in *Woods* concluded that reasonable minds could not differ on the question of foreseeability and held, as a matter of law, that Sanders' act was not reasonably foreseeable by defendant at the time it hired Sanders.[24] The court also held, as a matter of law, that defendant could not have reasonably foreseen that its retaining Sanders would lead to the rape of Woods.[25] Both determinations were made by the court without further reasoning. The court's failure to reveal its rationale provides trial judges with no guidance for determining in future cases whether foreseeability is a question which should be decided by the jury as an issue of fact or resolved by the court as a matter of law.

The court's review of the denial of a directed verdict for the defendant in *Woods* warrants close analysis. New Mexico law requires the reviewing court to resolve evidentiary conflicts in favor of the resisting party and to accept the inference or interpretation most favorable to that party.[26] The court unaccountably ignored conflicting testimony in *Woods* which supported plaintiff's contention that defendant should have foreseen Sanders' conduct.[27] The court's refusal, as a matter of law, to permit a finding of proximate cause and its conclusion that defendant's motion for a directed verdict should have been granted indicate a desire to assure that the judiciary can control the scope of liability for negligent hiring and retention. Why the court insisted upon such tight judicial control of the causes of action is less clear.

The vague and uncertain legal reasoning in *Woods* reflects the

22. 71 N.M. at 329, 378 P.2d at 370.

23. *Id.* at 334, 378 P.2d at 373.

24. 92 N.M. at 701, 594 P.2d at 749.

25. *Id.*

26. Skyhook Corp. v. Jasper, 90 N.M. 143, 560 P.2d 934 (1977); McGuire v. Pearson, 78 N.M. 357, 431 P.2d 735 (1967); Monden v. Elms, 73 N.M. 256, 387 P.2d 458 (1963).

27. Evidence indicated that Officer Leyba had questioned Houliston about Sanders in connection with a rape investigation. Answer Brief of Appellee Ann Woods, at 4, Woods v. F & T Co., 17 N.M. St. B. Bull. 2730 (Ct. App. Sept. 7, 1978). Leyba's discussion with Houliston was open to several inferences, including an inference that Houliston had deduced from Leyba's questions that Sanders was a suspect in a rape case. This inference, which was more favorable to the resisting party, was available to the court; yet it accepted the alternative inference that Houliston had no actual knowledge of Leyba's suspicions concerning Sanders.

court's concern with fundamental questions of policy which may have had a greater influence on the court's decision than the simplistic verbal formula defining proximate cause. The court revealed one interest which it sought to protect: the right of private and governmental employers to hire parolees without becoming "an insurer of the safety of any person who may at any time have had a customer relationship with that employer."[28] Other policy considerations, which were not articulated in the court's opinion, but which perhaps influenced the decision, were raised in an amicus brief filed by the attorney general on behalf of the state.

The amicus brief argued against the imposition of liability on a variety of public policy grounds. The state contended that imposing liability on the employer would discourage employers from offering employment to those eligible for, or on parole. Thus, it would hamper the state's parole program which seeks to promote employment for parolees in furtherance of its goal of rehabilitation.[29] The state also argued that imposing liability on employers who hire persons with criminal records would conflict with legislative policy concerning employment of former criminal offenders.[30] The Criminal Offenders Employment Act[31] expresses a legislative intent to encourage employment of past criminal offenders to aid in their rehabilitation, thereby benefiting both the public and the former offender.[32] To allow recovery in *Woods,* the state reasoned, would deter potential employers from hiring past criminal offenders, thereby substantially diminishing the employment prospects of these offenders, and

28. 92 N.M. at 701, 594 P.2d at 749. The court may have overestimated the effect of a finding of liability in *Woods.* To permit the jury to find the employer liable in *Woods* would not make employers insurers of customers' safety; it would merely permit a jury to sometimes find that an employer who had been negligent in hiring or retaining an employee could be held liable to a customer injured by that employee. As pointed out in Chief Justice Sosa's dissent, such a finding of causal connection falls within the "province of the jury." 92 N.M. at 702, 594 P.2d at 750 (Sosa, C. J., dissenting).

29. Brief of the State of New Mexico as Amicus Curiae in Support of Defendant-Appellant, at 4, Woods v. F & T Co., 17 N.M. St. B. Bull. 2730 (Ct. App. Sept. 7, 1978). *See* Probation and Parole Act, N.M. Stat. Ann. §§ 31-21-3 to -19 (1978). The importance of employment in rehabilitation is expressed in the Criminal Offenders Employment Act, N.M. Stat. Ann. § 28-2-1 to -6 (1978).

30. Brief of the State of New Mexico as Amicus Curiae in Support of Defendant-Appellant at 4.

31. N.M. Stat. Ann. §§ 28-2-1 to -6 (1978).

32. "The legislature finds that the public is best protected when criminal offenders or ex-convicts are given the opportunity to secure employment or to engage in a lawful trade, occupation or profession and that barriers to such employment should be removed to make rehabilitation feasible." N.M. Stat. Ann. § 28-2-2 (1978).

frustrating legislative intent;[33] such effects would be harmful to society.

The state also raised the possibility that, as a result of its waiver of sovereign immunity in the Tort Claims Act,[34] it could be threatened with liability for paroling a person who later injured someone. The state reasoned that if the employer were held liable for hiring the criminal offender, the parole board and parole officers who permitted or encouraged that decision could also be held liable.[35] The state was concerned that the effectiveness of its parole system would be diminished by the threat of liability for its unavoidable errors.[36] The state's role as employer-defendant in negligent hiring and retention actions, although not mentioned in the amicus brief, may also have concerned the state and the court. As the largest employer in New Mexico, with a stated policy of hiring past criminal offenders,[37] the state might well be the most frequent target of such suits.

Plaintiff responded in his answer brief by arguing that the parole program was "effectively abandoned" under the recently enacted Criminal Sentencing Act and that it no longer required the court's protection.[38] Plaintiff also asserted that the district court decision in

33. The Probation and Parole Act, N.M. Stat. Ann. § 31-21-10(A) (1978), provides for parole for a prisoner who can give evidence of having secured gainful employment.

> A. The board may release on parole any person confined in any correctional institution administered by state authorities, except persons under sentence of death, *when the prisoner gives evidence of having secured gainful employment or satisfactory evidence of self-support*, and the board finds in its opinion the prisoner can be released without detriment to himself or to the community.

Id. (emphasis added).

34. N.M. Stat. Ann. §§ 41-4-1 to -26 (1978).

35. Cases in which the parole authorities were named as defendants in similar actions include: Rieser v. District of Columbia, 563 F.2d 462 (D.C. Cir. 1977); Semlar v. Psychiatric Inst., 538 F.2d 121 (4th Cir.), *cert. denied*, 429 U.S. 827 (1976).

36. Brief of the State of New Mexico as Amicus Curiae in Support of Defendant-Appellant at 3.

37. The Criminal Offenders Employment Act, *supra* notes 31-32, applies only to state entities and entities licensed by the state. It requires these employers to hire employees with criminal records under certain circumstances.

38. Answer Brief to the Amicus Curiae Brief of the State of New Mexico, at 1, Woods v. F & T Co., 17 N.M. St. B. Bull. 2730 (Ct. App. Sept. 7, 1978). The Criminal Sentencing Act, N.M. Stat. Ann. §§ 31-18-12 to -21 (Supp. 1979) provides:

> A. If a person is convicted of a noncapital felony, the basic sentence of imprisonment is as follows:
>
> (1) for a first degree felony, eighteen years imprisonment;
>
> (2) for a second degree felony, nine years imprisonment;
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> (3) for a third degree felony, three years imprisonment; or
>
> (4) for a fourth degree felony, eighteen months imprisonment.
>
> B. The appropriate basic sentence of imprisonment shall be imposed upon a person convicted of a first, second, third or fourth degree felony unless the court alters such sentence pursuant to the provisions of Section 31-18-15.1, 31-18-16 or 31-18-17 NMSA 1978.
>
> C. The court shall include in the judgment and basic sentence of each person

Woods, which permitted recovery against an employer, had not impaired parolee employment.[39]

Perhaps the court found the state's arguments persuasive, but did not wish to universally exonerate employers from liability under all circumstances. By recognizing these actions, the court preserved the possibility that the victim of parolee crime might recover from the parolee's employer; by concluding, however, that, as a matter of law, proximate causation was lacking in *Woods,* the court presented a formidable barrier for any plaintiff to overcome. Although the court stopped short of precluding negligent hiring and retention causes of action, their viability must be questioned.

In *Woods,* the court faced a dilemma created by the conflict between the desire to assure employment opportunities for the parolee and the desire to compensate those injured by the tortious acts of parolee-employees. These goals are often irreconcilable because, even though the parolee-tortfeasor is personally liable to the victim of his tortious act, he is often judgment proof. By allowing the victim to reach the employer's "deeper pocket," the courts could impose liability on those better able to bear the cost initially. Employers then could spread the cost of victim compensation to the general public by raising prices.[40] Pressure on the courts to use this risk-spreading technique will increase as the public expresses more interest in crime victim compensation.[41] Unfortunately, the inevitable result of imposing liability upon employers for negligent hiring and retention will be to discourage the hiring of parolees because employers will avoid the risk of liability by simply not hiring them.[42]

convicted of a first, second, third or fourth degree felony, authority for a period of parole to be served in accordance with law after the completion of any actual time of imprisonment. The period of parole shall be deemed to be part of the sentence of the convicted person.

D. The court may, in addition to the imposition of a basic sentence of imprisonment, impose a fine not to exceed:

(1) for a first degree felony, fifteen thousand dollars ($15,000);

(2) for a second degree felony, ten thousand dollars ($10,000); or

(3) for a third or fourth degree felony, five thousand dollars ($5,000).

Id. § 31-18-15. It is doubtful that this provision "effectively eliminates" parole because the authority to grant a parole following the prescribed sentence is retained. In any event, employers might hesitate to hire anyone with a criminal record, including those on probation and prior criminal offenders, if employers could be held liable for hiring a person with a record.

39. Answer Brief to the Amicus Curiae Brief of the State of New Mexico at 2; Santa Fe New Mexican, Oct. 16, 1977, at D8.

40. *See* R. Posner, Economic Analysis of Law pt. II, ch. 4 (2d ed. 1977).

41. *See generally* Hook, *The Emerging Rights of the Victims of Crime,* 46 Fla. B.J. 192 (1972); Carrington, *Victim's Rights Litigation: A Wave of the Future?,* 11 U. Rich. L. Rev. 447 (1977).

42. Similarly, if liability were extended to the state, either as an employer or as the entity responsible for releasing safe parolees, the very granting of paroles might be discouraged as the state sought to avoid the risk of liability.

Sound legal advice to an employer in such a situation might well be to avoid all risk by not hiring anyone with a criminal record.

Judicial limitation or expansion of liability provides an imperfect solution. The extremes are equally untenable: to grant a jury unfettered discretion to determine whether an employee's criminal conduct was foreseeable by the employer may encourage compensation of victims but it may impair parolee employment; yet total rejection of the causes of action encourages parolee hiring but leaves victims uncompensated. An approach between the extremes will necessarily leave some parolees unemployed and some victims uncompensated.

By recognizing the negligent hiring and retention actions while maintaining the judicial veto provided by the foreseeability limitation, the court attempted to strike a balance between the dual policies of permitting victim compensation and encouraging parolee hiring. Yet, the *Woods* decision may facilitate neither goal. The heavy burden of proof imposed on the plaintiff in these actions by the poorly articulated foreseeability limitation discourages the filing of such suits. Conversely, no matter how difficult it might be to maintain negligent hiring and retention actions, they were judicially recognized in *Woods;* the resulting uncertainty as to what will be "foreseeable" may, however, discourage employers from hiring parolees. Until employers know what their duty of care is and for what acts of their employees they may be held liable, they will understandably hesitate to hire parolees. The *Woods* decision could result in the worst of both possible worlds: it may neither encourage parolee employment nor permit victim compensation.

Perhaps only the legislature can provide the comprehensive solution the problem requires. The legislature could establish a tax-supported fund to compensate the victims of parolee crime.[43] Such a fund would protect the state's parole program by providing to victims a source of compensation other than the employer, thereby reducing the employer's risk of loss and encouraging parolee employment. The cost of compensation under such a scheme would be passed on to the general public through taxes. Another potential solution would be to allow the state to indemnify employers who are held liable for negligent hiring and retention when they employ

43. Almost half the states have enacted some form of victim compensation assistance. For a discussion of the various approaches, see R. Meiners, Victim Compensation (1978); *Crime Victim Compensation: Hearings on Victims of Crime Compensation Legis. Before the Subcomm. on Crim. Just. of the House Comm. on the Judiciary,* 94th Cong., 1st & 2d Sess. (1975-76); National Inst. of L. Enforcement & Crim. Just., & Law Enforcement Assistance Ad., U.S. Dep't. of Just., Victim Compensation and Offender Restitution: A Selected Bibliography (1975).

parolees. By contract, the state would promise to pay any damages assessed against an employer for injury caused by a parolee who was employed in certain approved positions. An employer, therefore, would be encouraged to hire parolees. Furthermore, the state's promise to indemnify employers would assure that potential employers were aware of the parolee's criminal record and that each parolee was placed in a position consistent with public safety. Such individualized indemnification agreements would actively encourage parolee employment, compensate victims of parolee crime, and help to prevent the creation of dangerous employment situations which lead to parolee crime.

CONCLUSION

In *F & T Co. v. Woods,* the New Mexico Supreme Court recognized, but also limited, the availability of negligent hiring and retention causes of action against employers whose parolee-employees commit certain tortious acts. The decision, however, may frustrate efforts toward parolee employment and victim compensation. Recognition of the causes of action may discourage employers from exposing themselves to liability by hiring parolees, especially in light of the court's failure to formulate clear standards which would guide employers in making employment decisions. The foreseeability requirement poses a significant barrier to recovery which may well discourage victims from pursuing their claims; trial judges can now deny recovery on the basis that no reasonable jury could find an employee's tortious conduct to be foreseeable. The proper balance can only be struck by the legislature through more comprehensive approaches such as the enactment of a state victim compensation plan, or a state indemnification program.

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