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TRACKING DEVELOPMENTS IN EMPLOYMENT LAW

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The Michigan Court of Appeals Clarifies and Extends Protections to Employers Against Claims of Vicarious Liability and Negligent Supervision of Employees.

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On December 1, 2005, the Michigan Court of Appeals released for publication its decision in the matter of *Cawood, et. al. v. Rainbow Rehabilitation Centers, Inc.* (____ Mich. App. ____ Docket No. 03-001290-NO, re'd 12/01/05). In *Cawood*, plaintiffs appealed an order granting summary disposition. The Circuit Court had ruled that there was no genuine issue of material fact and that the employer defendant was entitled to judgment in its favor as a matter of law pursuant to Michigan Court Rule 2.116(C)(10). In *Cawood*, the Michigan Court of Appeals upheld the decision of the trial court that plaintiffs' case should be dismissed in that there was no genuine issue as to any material fact and that the corporate defendant was entitled to summary judgment in its favor as a matter of law.

The underlying focus of this litigation was a sexual encounter between a minor resident of one of defendant's homes for brain injured individuals and an employee of this home. Plaintiffs had filed a civil suit alleging negligence under theories of both vicarious and direct liability.

On appeal, plaintiffs first argued that the defendant could be held vicariously liable for the intentional acts of its employees. The *Cawood* opinion first refers to the generally established proposition in Michigan that an employer is not responsible for an intentional tort committed by an employee outside of the scope of his employment. *McClements v. Ford Motor Co.*, 473 Mich 373 (2005). No one contended that the rehabilitation center's employee was acting within the scope of his employment when he had sexual relations with the minor group home plaintiff. Instead, plaintiffs argued an exception to the general rule by indicating that the employee was aided in "accomplishing the tort" by virtue of the existence of an agency relationship between this employee and his employer. In response, the Michigan Court of Appeals in *Cawood* clarified that this exception, if it applies to tort

SECRET WARDLE NOTES:

Whenever a corporate client is sued for a claim of an intentional tort involving one of its employees, serious consideration should be given to having such claims dismissed through dispositive motions. In developing a record in support of a dispositive motion, initial discovery should include an analysis of a particular client's staffing policies in conjunction with an analysis of the standards and licensing requirements for a particular client's industry. Application of pertinent case law, such as the *Cawood* decision, should, in many instances, lead to civil cases against corporate clients being dismissed in part or in their entirety.

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actions at all, does not apply merely because the employment offers an opportunity for tortious activity. The Court stated that:

“In this case, defendant’s employee was not empowered to engage in the sexual contact by the existence of the agency relationship. He did not use his authority or any instrumentality entrusted to him in order to facilitate inappropriate encounter. Instead the existence of the employment relationship merely provided the employee with the opportunity to engage in the inappropriate conduct”.

The mere fact that the place of employment was the site where the inappropriate conduct took place was insufficient in the Appellate Court’s judgment to warrant a lawsuit premised upon a vicarious liability theory.

Plaintiffs next argued that the defendant rehabilitation center was directly liable to plaintiffs for a claim of an alleged failure to adequately staff its group home. Plaintiffs asserted that defendant’s staffing policies facilitated the ability of the employee to engage in inappropriate sexual relations. In *Cawood*, the Court of Appeals reviewed the factual record including requisite standards and licensing rules for the adultfoster care industry. Upon a review of the factual record, the Court of Appeals concluded that there was nothing in this record to indicate that defendant’s staffing policies were “inherently” inadequate. Moreover, plaintiff had failed to establish that defendant had a duty to staff a group home with more than one person or have a female staff member on duty the night of the sexual assault. As importantly, the Court indicated that even though defendant may have been aware of the group home minor’s decreased inhibitions, there was no evidence in the factual record that defendant knew or should have known that its employee would take advantage of the minor’s condition.

The fact that the *Cawood* opinion has been released for publication means that this decision will have precedential value in subsequent litigation when same or similar factual circumstances present themselves. In any claim in which a civil case is premised in whole or in part upon an assertion that one of defendant’s employees acted in an inappropriate manner to another, the following should be ascertained. First, whether the claimed inappropriate conduct was intentional in nature. Second, whether the claimed inappropriate conduct was outside the scope of the alleged tortfeasor’s employment. Third, whether the employer-defendant met all applicable licensing and staffing requirements for its particular industry. In those circumstances in which a defendant-employer has met industry standards and one of its employees has conducted an inappropriate intentional act outside of the scope of his employment, a motion for summary disposition based upon the *Cawood* opinion should be seriously considered.

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