

IN THE SUPREME COURT OF OHIO

JEFFERY ABRAMS, ET AL.,

Plaintiffs-Appellants

v.

CHARLES M. WORTHINGTON,
ET AL.,

Defendants-Appellees.

Case No.

07-0087

Discretionary Appeal from the
Franklin County Court of Appeals,
Case No. 05 AP-912

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS
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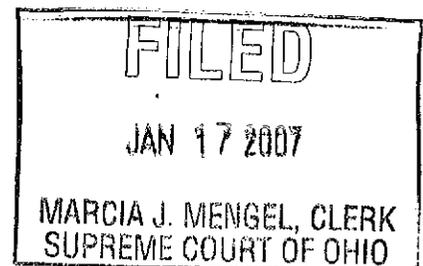


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THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST

Picture this: A HVAC company that performs maintenance work on furnaces and air-conditioners within people's homes hires John Doe with knowledge that he has criminal convictions for molesting children and for assault. Jane Doe, a mother of four little girls, is having trouble getting her furnace to work and calls the HVAC company for assistance.

Pursuant to his employment duties with the HVAC company, John Doe is sent to Jane Doe's home to fix the furnace. Once within her home, he sees Jane Doe and her four little girls, and realizes that they live there by themselves. After fixing the furnace, he receives a call on his cell phone from the president of the HVAC company notifying him that he has been terminated from his employment effective immediately. Moments later, he assaults the mother and molests the four little girls. Jane Doe then brings negligent hiring and negligent retention claims against the HVAC company. Under the holding of the Tenth District Court of Appeals, the HVAC company would have absolutely no liability to Jane Doe or her four little girls simply because the employment relationship had been terminated mere moments before John Doe's acts. This cannot be the law of the State of Ohio, nor should it be.

In this case, Appellee Charles M. Worthington ("Appellee") hired an employee for the position of residential mover with, at a minimum, constructive knowledge of his criminal past for theft, breaking and entering, burglary, and receiving stolen property. Despite this knowledge, Appellee placed this employee within Appellants Jeffery and Joyce Abrams' ("Appellants") home to perform moving services, which was the only contact the employee ever had with Appellants and their home. The employee later

returned to the home and assaulted and robbed Appellants. The Court of Appeals apparently ignored this evidence or held it in low esteem, and upheld summary judgment in favor of Appellees, based solely on the fact that Appellee had ended the employment relationship by the time the employee committed the criminal conduct.

The holding of the Court of Appeals stands for the *carte blanche* proposition that after the termination of an employment relationship, an employer can never be liable for the subsequent wrongful acts of one of its employees that causes harm to another, regardless of how grossly negligent the employer may have been in hiring the employee and regardless of whether its hiring decision was the proximate cause of the harm. Never before has an Ohio appellate court made such a sweeping limitation on an employer's liability in the context of a negligent hiring or negligent retention claim. Not only is the holding of the Court of Appeals poor public policy that allows employers a free pass for the harms caused by their negligent actions, but it also completely severs the element of proximate cause from the tort of negligent hiring or negligent retention.

This is a case of great public and general interest because literally thousands of Ohioans come into contact with employees of various employers everyday. Unfortunately, many of these employees will cause harm to Ohioans as a proximate result of an employer's negligence in hiring the employee. Such Ohioans should not be left without a remedy merely because the employee had previously been terminated. Moreover, negligent employers should not be relieved from liability for what their negligence proximately caused. Such a result is simply not consistent with the principles of justice and should not be the law of the State of Ohio.

There is not a wealth of case law in Ohio interpreting negligent hiring and negligent retention claims. There is even less case law dealing with a negligent hire after the employee has been terminated. Simply put, the Court of Appeals holding goes too far. It needs to be reasonably narrowed. The holding artificially cuts off an employer's liability for what it would otherwise be liable. This is a disturbing precedent. Given the relative lack of case law in the area, this precedent will likely establish the standard that will be followed by all of Ohio's appellate districts if for no other reason than it is easily applied. An easy application, however, is not the proper way to develop law. This is a case of great public and general interest because it provides the Supreme Court of Ohio with the opportunity to develop a legal standard in an area of law that is important and at this point in time undeveloped.

Yet another reason why this is a case of great public and general interest is because it provides the Supreme Court of Ohio with the opportunity to make an employer subject to the same principles as the rest of Ohio's citizens. That is, if an employer's negligence is the proximate cause of a third party's harm, then the employer should be liable for its negligence. This is not a novel or new idea, but rather what the law has been all along. The Court of Appeals deviated from the traditional principles of negligence by severing the proximate cause analysis from a negligent hiring or negligent retention claim. Thus, it is of great importance to the citizens of Ohio that its Supreme Court reestablish the firmly rooted elements of a negligence claim by granting jurisdiction in this case.

STATEMENT OF THE CASE AND FACTS

Appellee is an individual engaged in the business of providing moving services under the name of "A Family Moving Company." Appellee's employees, like the employees of any other residential moving company, are regularly provided access to the personal property and homes of Appellee's clients. Simply put, it's the nature of their jobs.

Two of Appellee's former hires, Chad Sullivan ("Sullivan") and Shawn Scott ("Scott"), provided the basis of Appellants' negligent hiring and negligent retention claims. Scott was hired by Appellee in February of 1999 and stayed with the company until he resigned in March 2004. After Scott was hired, Appellee learned that Scott had a criminal record. Appellee, however, never asked any questions regarding the nature of the conviction and never performed any further investigation as to the nature of Scott's criminal past. Sullivan was hired by Appellee on August 27, 2001. Sullivan, who was Scott's half-brother, was recommended for employment by Scott.

Scott and Sullivan both had criminal records prior to being hired by Appellee. Prior to being hired, Scott had felony convictions for, among other things, felony burglary, theft, and receiving stolen property. Sullivan had prior convictions for theft, burglary, and receiving stolen property in Franklin County alone, along with convictions for breaking and entering and theft in Madison County.

Appellee testified that it was his policy to perform a "background check" on new employees. That check, however, was limited to an online records search in the Franklin County Municipal Court. Appellee never considered doing a complete background check and, based on the criminal record available online from the Franklin County Municipal

Court at the time regarding Sullivan, it would not have made a difference in his hiring decision.

Even more troubling is the fact that Appellee, in his employment application, did not even ask whether a potential employee had a criminal background, nor did Appellee ask this question independent of the application. In addition, Appellee never contacted the "former employers" identified by potential employees on their application, and more particular, with regard to Sullivan, never questioned Mr. Sullivan regarding the gap in employment from October of 1998 to November of 1999. Had Appellee properly investigated this matter, Appellee would have discovered that Sullivan had a gap in employment during that time because he was incarcerated in Madison County, Ohio, for breaking and entering and theft.

In December of 2001, Appellants Jeffery and Joyce Abrams were about to move to a newly constructed home. On December 21, 2001, Sullivan was part of a three man crew that performed moving services for Appellants pursuant to his job duties with Appellee. The move went without incident. Subsequently, Sullivan was terminated from his employment by Appellees. Sullivan, however, was not done taking advantage of his employment with Appellee.

Less than three months after the move, Sullivan returned to Appellants' residence, along with four other individuals, and committed a home invasion type robbery. Sullivan, along with four masked individuals, attacked Mr. Abrams while he stood at his back porch. All five individuals, including Sullivan, wore military fatigues, black masks, and were brandishing guns. The group gained access to Appellants' home, and

assaulted, beat, and held Appellants at gunpoint while ransacking and robbing their residence. Sullivan and the four other individuals were later convicted of their crimes.

The performance of moving services, pursuant to his employment with Appellee was the sole contact that Sullivan had with Appellants and their newly built home. During the process of moving the Appellants into their home, Sullivan obviously became aware of the fact that Appellants were the only ones residing in this newly built home, and that the home was situated on approximately 40 acres of land out in the country. Undoubtedly, this information came into play in Sullivan's decision to commit the crime.

On March 11, 2004, Appellants filed suit in the Franklin County Court of Common Pleas against Appellee asserting claims for negligent hiring and negligent retention. Eventually, Appellee filed a motion for summary judgment, which was granted by the trial court.

Appellants then timely appealed the trial court's decision to the Tenth District Court of Appeals. The Court of Appeals affirmed summary judgment in favor of the Appellee based on Scott's employment on the grounds that Appellee played no role in bringing Scott into contact with the Appellants. In addition, the Court of Appeals affirmed summary judgment for Appellee on Appellants' claims premised on Sullivan's employment based upon nothing more than the fact that the employment relationship between Appellee and Sullivan was over before Sullivan participated in the home invasion robbery.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW : An employer's liability for negligent hiring is not severed simply because the employment relationship has ended at the time of the employee's wrongful act. Rather, the termination of the employment relationship is just one factor among many to consider when determining proximate cause.

The elements of a negligent hiring/negligent retention claim are (1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence (4) the employee's act or omission causing the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries. *Evans v. Ohio State Univ.* (1996), 112 Ohio App. 3d 724, 739 (citations omitted).

As mentioned above, the Court of Appeals held that the lack of an employment relationship at the time of Sullivan's wrongful acts precluded Appellee from being found liable under a theory of negligent hiring or negligent retention. The Court of Appeals reasoned that when the employment relationship between Appellee and Sullivan ended, so to did Appellee's duty to Appellants. This reasoning is misplaced.

In negligent hiring cases, courts impose a duty upon employers to exercise reasonable care in the selection of employees, who, in the performance of their duties, will have the opportunity to commit a crime against a third person. *Staten v. Ohio Exterminating Co., Inc.* (1997), 123 Ohio App. 3d 526, 530 (citations omitted).

In this case, Appellee placed its employees within the homes of third persons, including Appellants, on a daily basis. Accordingly, Appellee had a duty to exercise reasonable care in the selection of its employees. Appellee breached that duty when it hired Sullivan, notwithstanding his criminal record, and placed him within Appellants'

home. Thus, Appellee's duty to Appellants could not have ceased when it terminated Sullivan's employment, because the duty had already been breached. Since Appellee's duty had already been breached, the end of Sullivan's employment relationship was not applicable to the element of duty, but rather to the element of proximate cause.

The relevant issue should have become: did the end of the employment relationship between Sullivan and Appellee break the proximate connection between Appellants' injuries and Appellee's negligent acts? Instead, the Court of Appeals completely disregarded the element of proximate cause and jumped all the way back to the element of duty in holding that the end of the employment relationship precluded a finding that Appellee was negligent in hiring and/or retaining Sullivan.

The Court of Appeals' logic is simply not correct. This is especially true when put into practice. To demonstrate this fact, let's go back to the example in the opening paragraphs of this Brief. Under that example, the HVAC company breached its duty to Jane Doe and her four little girls by hiring John Doe, a known pedophile with a criminal record for assault, and then placing John Doe within Jane Doe's home. John Doe then assaulted Jane Doe and molested her four little girls. Reasonable minds could only conclude that the harm caused by John Doe's wrongful conduct was proximately caused by the HVAC company's negligence in hiring John Doe and then placing him within Jane Doe's home. Under the Court of Appeals' holding, however, the HVAC company would escape liability because it had terminated John Doe's employment mere moments before his wrongful conduct.

Under the proposition of law suggested by Appellants, however, the HVAC company would clearly be liable to Jane Doe and her four little girls as the HVAC

company's termination of John Doe clearly did not break the causal chain between the HVAC company's negligence and the harm caused to Jane Doe and her girls. Thus, the HVAC company's negligence would have been the proximate cause of Jane Doe and her children's damage regardless of whether the employment relationship had been terminated or had remained in existence.

Under the proposition of law presented by Appellants, the termination of an employment relationship would be a factor in establishing proximate cause and not a determinative fact. Like any other intervening event following a breach of a duty, a jury would consider whether the termination of an employee broke the causal connection between the negligence and the injury. In other words, the issue would become whether the resulting harm was foreseeable to the employer despite the termination of the employment relationship. This proposition of law is consistent with the traditional elements of negligence, and does not unjustly insulate employers from liability for the harm their negligence proximately causes.

On the flip side, Appellants' proposition of law does not unfairly expose employers to unlimited liability. Going back to the above example, suppose that rather than performing maintenance on Jane Doe's furnace he performed maintenance on her neighbor's furnace pursuant to his employment with the HVAC company. Now assume that a week later John Doe is terminated by the HVAC company, but nonetheless receives a phone call from Jane Doe about fixing her furnace because she had heard about his work through her neighbor. John Doe goes over to her house and subsequently assaults Jane Doe and molests her four little girls. In this situation, the HVAC company's negligence in hiring John Doe would not have been the proximate cause of

the harm suffered by Jane Doe and her children, because there would not have been a proximate connection between John Doe's employment with the HVAC company and his entrance into Jane Doe's home. Consequently, Appellants' proposition of law would not lead to a slippery slope of employer liability. Rather, an employer's liability, like any other person's liability, would be limited to the harms proximately caused by the employer's negligent conduct.

The proper analysis in a negligent hiring and/or negligent retention claim is whether an employer breached its duty of care to a third person by hiring an employee that is unreasonably dangerous to the third person. When the employer negligently hires a person with criminal propensities, he breaches his duty of care to third persons to the extent that it places those people under a foreseeable risk of harm. If that breach of duty proximately causes harm to a third person, then, just like any other negligence action, the employer should be liable to that third person for the harm caused. Appellants' proposition of law does not mean that the termination of an employment relationship is completely irrelevant where an employer breaches its duty to a third person by hiring an unreasonably dangerous employee. Indeed, under Appellants' proposition of law, the termination of an employment relationship is relevant, but only to the element of proximate cause and not to the element of duty.

This proposition of law is not completely new and has, to an extent, formerly been applied by the Tenth District Court of Appeals prior to the current case. Indeed, in both *Staten v. Ohio Exterminating Co., Inc.* (1997), 123 Ohio App. 3d 526 and *Evans v. Ohio State Univ.* (1996), 112 Ohio App. 3d 724, the Tenth District Court of Appeals considered claims of negligent hiring based upon wrongful conduct that occurred after

the termination of an employment relationship. In both *Staten* and *Evans*, the Court of Appeals did not hold that because an employment relationship had ended that the plaintiffs were completely precluded from recovery under a claim of negligent hiring. Rather, the courts analyzed the foreseeable nature of the harm suffered by the plaintiffs. The Court of Appeals admitted this much in its decision in the current case. The reasoning employed in the decisions of *Staten* and *Evans*, although not completely correct, is far more in line with the basic principles of negligence than is the Court of Appeals decision in the current case

The proposition of law adopted by the Tenth District Court of Appeals is simply too broad and frankly inconsistent with the basic principles of negligence. Appellants' proposition of law seeks to return the law of negligent hiring back to the well established principles of negligence. That is, if one has acted negligently, and that negligence proximately causes harm to another, then the negligent actor should be liable for his or her conduct. As such, an employer's liability for negligent hiring is not severed simply because the employment relationship has ended at the time of the employee's wrongful act. Rather, the termination of the employment relationship is just one factor among many to consider when determining proximate cause.

CONCLUSION

The holding of the Court of Appeals has deviated far away from the basic principles of negligence. It will allow employers to avoid responsibility for their negligent actions in hiring and/or retaining employees even if that negligence proximately resulted in harm to a third party simply because a wrongful act, by one of its employees, occurred after the termination of the employment relationship.

Such a result unfairly insulates employers from liability and unfairly denies third parties a remedy for their harm. The current case provides a classic example. Appellants were assaulted, beat, and robbed by one of Appellee's employees, who was placed in their home, by Appellee, despite his criminal record. At the very least, this case should have been submitted to the jury on the issue of proximate cause. The Court of Appeals, however, completely severed the proximate cause element from the analysis and instead made the *carte blanche* determination that an employer can never be liable for its negligent conduct in hiring and/or retaining its employees once the employment relationship has been terminated.

This is not justice and should not remain or become the law of the State of Ohio. Consequently, Appellants respectfully request that the Supreme Court of Ohio exercise its discretion to grant jurisdiction to decide authoritatively whether an employer may be liable for its negligence in hiring an unreasonably dangerous employee when the employee's wrongful acts occur after the termination of the employment relationship.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing has been served by regular U.S. mail on January 17th, 2007, upon the following:

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Attorney for Appellee
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Mark R. Meterko (0080992)

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

CLERK OF COURTS

Jeffery Abrams et al.,

:

Plaintiffs-Appellants,

:

v.

:

Charles M. Worthington et al.,

:

Defendants-Appellees.

:

No. 05AP-912

(C.P.C. No. 04CVC03-2858)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on October 24, 2006, appellants' assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs assessed against appellants.

KLATT, P.J., BROWN & McGRATH, JJ.

By

William A. Klatt

Judge William A. Klatt, Presiding Judge

A

CLERK OF COURTS

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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Jeffery Abrams et al., :
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 Plaintiffs-Appellants, :
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 v. : No. 05AP-912
 : (C.P.C. No. 04CVC03-2858)
 Charles M. Worthington et al., : (REGULAR CALENDAR)
 :
 Defendants-Appellees. :

O P I N I O N

Rendered on October 24, 2006

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Edwin J. Hollem Co., L.P.A., and Edwin J. Hollem, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

KLATT, P.J.

{¶1} Plaintiffs-appellants, Jeffrey and Joyce Abrams, appeal from a judgment of the Franklin County Court of Common Pleas that granted summary judgment in favor of defendants-appellees, Charles M. Worthington and Michael Worthington.¹ For the following reasons, we affirm.

¹ Apparently, Charles M. Worthington and Michael Worthington are the same person—Charles Michael Worthington. Because the Abrams never amended their complaint to reflect this fact, we name both as parties to this appeal, but hereinafter, we will refer to appellants simply as "Worthington."

B

{¶2} Worthington does business as "A Family Moving Company," which primarily provides household moving services. In late 2001, Joyce Abrams hired Worthington to move her and her husband's belongings into their newly-built house in Pataskala, Ohio. One of the three Worthington employees who participated in the December 21, 2001 move was Chad Sullivan.

{¶3} Worthington had hired Sullivan to be a mover approximately four months before the Abrams' move. During the hiring process, Sullivan completed an application form that requested his personal data, employment history, and driving experience. Additionally, the manager of A Family Moving Company interviewed Sullivan. However, neither the application form nor the interview uncovered Sullivan's criminal record, which included convictions for theft, burglary, and receiving stolen property.

{¶4} At the time Worthington hired Sullivan, he already employed Sullivan's brother, Shawn Scott, as a mover. Worthington considered Scott a hard-working, well-mannered employee. About a year after Worthington hired Scott, he discovered that Scott had previously been convicted of passing bad checks. Due to Scott's satisfactory job performance, Worthington decided to retain Scott despite his criminal background. In March 2004, Scott left Worthington of his own accord for another job.

{¶5} Unlike his brother, Sullivan did not prove to be a good employee. In January 2002, Worthington terminated Sullivan's employment because of his bad attitude, poor work performance, and unreliability.

{¶6} Approximately two months after Worthington fired Sullivan, on the night of March 14, 2002, Sullivan and four or five accomplices attacked Jeffrey Abrams in his backyard. They dragged him into his home, where they bound him and his wife. Jeffrey

Abrams' assailants beat him and stole valuables, including Joyce Abrams' engagement ring, before driving away in the Abrams' car.

{¶7} Ultimately, the Pataskala Division of Police arrested Sullivan for his participation in the home-invasion robbery. While investigating Sullivan's involvement in the robbery, Deputy Chief Bruce Brooks interviewed Scott, who told Deputy Chief Brooks that Sullivan had driven him to the Abrams' house prior to the robbery and told him of his plan to commit the robbery. After the robbery, the police found the Abrams' stolen car in the parking lot of Scott's apartment complex. The police also discovered that Scott owned a car that matched the description of the car driven by the perpetrators of the robbery. Despite these facts, Scott was never charged with any crime arising from the robbery. Sullivan, however, was charged with multiple offenses and pled no contest to one count of aggravated burglary, one count of aggravated robbery, two counts of kidnapping, one count of disrupting public services, and three counts of grand theft. He is now incarcerated.

{¶8} On March 11, 2004, the Abrams filed a complaint against Worthington in which they asserted claims for negligent hiring and negligent retention. The Abrams alleged that they were injured because Worthington failed to exercise reasonable care in hiring and retaining both Sullivan and Scott.

{¶9} On May 6, 2005, Worthington moved for summary judgment, arguing that he could not foresee that his employees would participate in a robbery of one of his clients. The trial court agreed, and it granted judgment in Worthington's favor on August 3, 2005. The Abrams now appeal from that judgment.

{¶10} On appeal, the Abrams assign the following errors:

[1.] THE TRIAL COURT ERRED IN FAILING TO CONSTRUE THE EVIDENCE IN FAVOR OF APPELLANTS.

[2.] THE TRIAL COURT ERRED BY GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

{¶11} Because they are interrelated, we will discuss the Abrams' two assignments of error together. Both assignments of error challenge the trial court's decision on summary judgment. Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. Of Commrs.* (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103. Civ.R. 56(C) provides that summary judgment may be granted when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183.

{¶12} By the Abrams' first and second assignments of error, they argue that the trial court erred in granting summary judgment because they presented sufficient evidence to create a question of fact as to whether Worthington negligently hired and retained Sullivan and Scott. We disagree.

{¶13} Ohio courts have previously recognized the torts of negligent hiring and negligent retention. When defining the conduct these torts make actionable, this court has relied upon Restatement of Law 2d, Agency (1958), Section 213, which states:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

(b) in the employment of improper persons or instrumentalities in work involving risk of harm to others[.]

See *Groner v. deLevie* (May 1, 2001), Franklin App. No. 00AP-1244; *Staten v. Ohio Exterminating Co.* (1997), 123 Ohio App.3d 526, 528-529; *Evans v. Ohio State Univ.* (1996), 112 Ohio App.3d 724, 739. A more succinct statement of the actionable conduct is included in the recently-published Third Restatement of Agency:

A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.

Restatement of Law 3d, Agency (2006), Section 7.05(1).

{¶14} Under either formulation, if an employer, without exercising reasonable care, employs an incompetent person in a job which brings him into contact with others, then the employer is subject to liability for any harm the employee's incompetency causes. *Staten*, supra, at 529, quoting Restatement of Law 2d, Agency (1958), Section 213, Comment *d*. Liability for negligent hiring and negligent retention arises because the employer chooses to employ an individual who "had a past history of criminal, tortious, or otherwise dangerous conduct about which the [employer] knew or could have discovered through reasonable investigation." *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 61.

{¶15} As with all other negligence-based torts, a plaintiff must prove the basic elements of negligence—duty, breach, proximate cause, and damages—in order to prevail on claims for negligent hiring and negligent retention. In Ohio, the existence of a

duty depends upon the foreseeability of injury to the plaintiff. *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142; *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77. "The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." *Id.* at 77.

{¶16} However, foreseeability alone does not necessarily impose a duty to act. *Estates of Morgan v. Fairfield Family Counseling Ctr.* (1997), 77 Ohio St.3d 284, 293; *Simpson v. Big Bear Stores Co.* (1995), 73 Ohio St.3d 130, 134. Even if an injury is foreseeable, a defendant has no duty to protect a plaintiff from or to control the conduct of a third person. *Conver v. EKH Co.*, Franklin App. No. 02AP-1307, 2003-Ohio-5033, at ¶38; *Jackson v. Forest City Enterprises, Inc.* (1996), 111 Ohio App.3d 283, 285; *Slagle v. White Castle Systems, Inc.* (1992), 79 Ohio App.3d 210, 216. In such situations, a duty only arises if the defendant shares a "special relation" with the plaintiff or the third person that justifies the imposition of the duty. *Estates of Morgan*, *supra*, at 293-294; *Simpson*, *supra*, at 133-134; *Federal Steel & Wire Corp. v. Ruhlin Constr. Co.* (1989), 45 Ohio St.3d 171, 173; *Gelbman v. Second Natl. Bank* (1984), 9 Ohio St.3d 77, 78-79. These "special relations" include the employer and employee relationship. *Slagle*, *supra*, at 216. Thus, due to the nature of the employer/employee relationship, an employer has a duty to prevent foreseeable injury to others by exercising reasonable care to avoid employing an incompetent employee. See Restatement of Law 3d, Agency (2006), Section 7.05, Comment a (recognizing that Section 7.05(1) is a specific instance of the general tort-law principle that "[a]n actor in a special relationship with another owes a duty of reasonable

care to third persons with regard to risks posed by the other that arise out of the relationship").

{¶17} In the case at bar, the employment relationship between Worthington and Sullivan was over before Sullivan participated in the home-invasion robbery. In the absence of this "special relation," Worthington owed no duty to the Abrams. Thus, we conclude that the trial court properly granted summary judgment to Worthington on the negligent hiring and negligent retention claims premised upon Sullivan's employment.

{¶18} In reaching this conclusion, we are mindful that in analogous precedent, our analysis of the duty element solely turned upon whether injury to the plaintiff was foreseeable. In both *Staten* and *Evans*, the plaintiffs sought relief for the injuries caused by the criminal acts of the defendants' former employees. We found that the defendants did not owe the plaintiffs a duty of care because a reasonable person could not foresee that the ex-employees would injure the plaintiffs months after their employments ended. Essentially, our reasoning conflated the two elements necessary for a duty to arise in negligent hiring and negligent retention cases—the existence of an employment relationship *and* foreseeability of injury. We now clarify that both elements must be considered separately and, based upon the lack of an employment relationship between Worthington and Sullivan at the time of the Abrams' injuries, conclude that Worthington did not owe the Abrams a duty to prevent Sullivan from causing their injuries.

{¶19} Unlike Sullivan, Scott was a Worthington employee at the time of the home-invasion robbery, and thus, we must determine whether a reasonably prudent person in Worthington's position would foresee that Scott's actions would harm the Abrams. As Scott was not one of the three employees who participated in the Abrams' move,

Worthington played no role in bringing Scott into contact with the Abrams. Without Worthington's employment of Scott facilitating his causing harm to the Abrams, Worthington could not foresee the Abrams' injury. Thus, Worthington did not owe the Abrams any duty to prevent Scott from causing their injuries. Therefore, we conclude that the trial court properly granted summary judgment to Worthington on the negligent hiring and negligent retention claims premised upon Scott's employment.

{¶20} For the foregoing reasons, we overrule the Abrams' two assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and McGRATH, JJ., concur.
