SHORT FORM ORDER Index No.: 14514/93

SUPREME COURT OF THE STATE OF NEW YORK
Trial\Special Term Part 28 Suffolk County

P R E S E N T :

HON. ALAN D. OSHRIN

Motion Return Date: Aug. 13, 2001
Motion Submit Date: Sept. 13, 2001
Motion Seq.: 020 MD
023 XMD

Motion Return Date: Sept. 4, 2001
Motion Submit Date: Sept. 13, 2001
Motion Seq.: 021 MOTD RRH

Motion Return Date: Aug. 13, 2001
Motion Submit Date: Sept. 13, 2001
Motion Seq: 022 XMD

LUCILLE GIANGRASSO AS CONSERVATOR FOR ANNETTE DENISE GIANGRASSO,

Plaintiff,

- against -

ASSOCIATION FOR HELP OF RETARDED CHILDREN AND TOWN TRANSPORT BUS CO.

Defendants.

TOWNE BUS CORP. s/h/a TOWN TRANSPORT BUS CO.,

Third-Party Plaintiff,

- against -

MARK BRITTON,

Third-Party Defendant.

Plaintiff's Atty:

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Upon the following papers numbered 1 to 51 read on these various motions; Notice of Motion and supporting papers 1 to 17; Notice of Motion and supporting papers 18 TO 24; Notice of Cross Motion and supporting papers 25 to 26;Notice of Cross Motion and supporting papers 27 to 36; Affirmation in Opposition and supporting papers 37 to 38; Affirmation and supporting papers 39 to 46; Reply Affirmation and supporting papers 47 to 49; Affirmation and supporting papers 50 to 51; it is

ORDERED that the plaintiff's CPLR 3212 motion for summary judgment as against the defendants, Association for Help of Retarded Children and Towne Transport Bus. Co., on the issue of liability is denied; and it is further

ORDERED that the plaintiff's CPLR 2221 motion to renew/reargue her motion for expanded disclosure of incident reports denied by this Court's Opinion dated July 5, 2001 is granted; and it is further

ORDERED that upon reargument a conference will be held on March 6th, 2002 at 9:30 a.m. in Courtroom D53, Fifth Floor, District Court Building, Cohalan Court Complex, 400 Carleton Avenue, Central Islip, New York, to discuss the issue; and it is further

ORDERED that the defendant, Towne Transport Bus Co.'s CPLR 3212 cross motion for summary judgment on the issue of liability is denied; and it is further

ORDERED that the defendant, Association for the Help of Retarded Children's CPLR 3212 cross motion for summary judgment on its cross claim for indemnification against the co-defendant, Towne Bus Co. is denied.

The plaintiff moves for summary judgment on the issue of liability as against the Association for Help of Retarded Children (hereinafter "AHRC") and Towne Transport Bus, Inc (hereinafter "Towne Bus"). The basis for the motion is that the defendants have violated section 33.17 of the Mental Hygiene Law; that such violation of statute constitutes negligence per se, and that the sexual assault by Mark Britton was foreseeable.

Section 33.17 of the Mental Hygiene Law provides that "[a]ny female patient who is being transported to or from a facility shall be accompanied by another female, unless accompanied by her father, brother, husband, or son" (McKinney's Cons. Laws of NY, Book 34A, Mental Hygiene Law § 33.17). The plaintiff brings to the Court's attention the definitions for the terms "patient" (MHL § 1.03 [23]); "facility" (MHL § 103[6]) "mental disability" (MHL § 1.03[3]); "mental retardation" (MHL § 1.03[21]) and developmental disability" (MHL § 103[22]) and argues that the AHRC sheltered workshops fall within the scope of section 33.17. In support of this argument the plaintiff indicates that in 1970, the New York State Legislature rejected a bill that would have limited the requirement for female supervision to female patients "who [were] being transported to a facility for admission as an in-patient" (citing S.B. 9486 at 124). The plaintiff argues that "[t]he fact that the Legislature rejected this limiting language and opted instead for language including all female patients, indicates a legislative intent to provide broad protection to vulnerable, mentally disabled women". The plaintiff also argues on the authority of ***Cucalon v. State of New York*** (103 Misc2d 808, 427 NYS2d 149 [1980]) that when there is a violation of section 33.17 of the Mental

Hygiene Law, the sexual assault and rape of a female patient who was not accompanied by a female worker, is foreseeable and, therefore, that summary judgment is appropriate.

In opposing the motion, AHRC states that it was not until the July 18, 2001 Supplemental Verified Bill of Particulars, served eight years after the commencement of the action, that the plaintiff alleged the existence and violation of section 33.17 of the Mental Hygiene Law. AHRC states that the State of New York Office of Mental Retardation and Developmental Disabilities (hereinafter "OMRDD") oversees and is responsible for enforcing the statutes and regulations concerning those with mental retardation and/or developmental disabilities; that by letter dated October 17, 2000, OMRDD program specialist, Carol Kriss, authored a letter to the defendant AHRC's liability expert stating, in part: "matrons or aides are only required on a vehicle if specified in a consumer's Individual Program Plan (IPP)"; that it is undisputed that Denise Giangrasso's Individual Program Plan never called for a matron on the bus that took her to and from the Work Activities Program at AHRC; that OMRDD was aware before Denise Giangrasso's assault that AHRC had a Work Activities Program and that moderately retarded adults such as Denise Giangrasso were transported to and from that program without matrons on their buses; that at no time before this incident did OMRDD advise AHRC that matrons were required and/or issue a citation to AHRC for failure to provide matrons under such circumstances; that following Denise Giangrasso's assault by Mark Britton, OMRDD was notified by AHRC of the incident and OMRDD never cited or reprimanded AHRC for this incident and never advised or requested that the transportation arrangements be changed; that at no time before or after Denise Giangrasso's assault did her mother, Lucille Giangrasso, request that a matron be placed on the bus to protect Denise, and that despite the allegation that AHRC is somehow responsible for the assault, Lucille Giangrasso has kept her daughter in the Work Activities Program at AHRC to this day, and Denise is transported by bus (without a matron) as she was before the incident occurred.

AHRC argues that both the letter and spirit of section 33.17 suggest that it was never intended to govern Work Activities Programs; that AHRC's liability expert, Margaret Groce, with more than 25 years experience in the field of travel training for those with mental retardation and/or developmental disabilities has not once seen this statute applied to moderately retarded adults being transported to and from a Work Activities Program, and that at no time prior to Denise Giangrasso's assault did AHRC have any internal rule requiring that matrons be placed on buses transporting moderately retarded adults such as Denise to and from the Work Activities Program. AHRC also argues that the ***Cucalon*** case is distinguishable because the thrust of the Court's decision is that there was a violation of a specific hospital rule that a female patient not remain alone with a male employee, and that there is no such internal rule at AHRC.

In ***Cucalon*** a female inpatient at the Kingsboro Psychiatric Center was taken for an EEG examination by a female staff member who did not accompany the patient into the EEG room for the test. The patient was sexually assaulted and raped by a male EEG technician. The State facility had a rule prohibiting a female patient from remaining alone with a male employee. The court wrote "[t]he key facts asserted in Claimant's affidavit are that there was a direct violation of the hospital rules and concomitant breach of the hospital's duty to her which resulted in her assault and rape". The only reference to section 33.17 is contained in a footnote. The footnote also refers to a rule of the Commissioner of Mental Hygiene (14 NYCRR 17.7) which provides "[i]n consultation with the patient, the treatment team shall determine who may accompany a woman patient who is being transported to or from a facility". As part of the footnote the court wrote "[c]learly in the court's opinion, the statute which requires female patients to be accompanied by another female include the situation where a female patient is being transferred from a ward into another ward or another part of the same facility for medical treatment or diagnosis".

It is evident to this Court that the basis for the ruling in ***Cucalon*** is the violation of a specific hospital rule, and that any discussion of section 33.17 and 14 NYCRR 17.7, confined to a footnote is not seminal to the ruling. Additionally, as will be discussed below, this Court is not in agreement with the ***Cucalon*** court's interpretation of section 33.17.

Section 33.17 derives from the Mental Hygiene Law of 1927 with amendments in 1944, 1959, 1960 and 1964. The pertinent language in the 1927 legislation provides:

> ...the hospital to which any patient is ordered to be sent shall, by and under the regulations made by the commissioner, send a trained attendant to bring the patient to the hospital. Each female committed to any institution for the insane shall be accompanied by a female attendant unless accompanied by her father, brother, husband or son.

By the 1944 amendment, the phrase "committed to any institution for the insane" was changed to "certified to any institution for the mentally ill". The language is otherwise unchanged. The 1959 and 1960 amendments to the statute do not affect the language in question. The pertinent language in the 1964 amendment provides:

> ... the institution or facility in the department to which any patient is sent shall, by and under the regulations made by the commissioner, send a trained attendant to bring the patient to such institution or facility. Each female transferred and admitted to any such hospital shall be accompanied by a female attendant, unless accompanied by her father, brother, husband or son.

In addition to the statute there are rules of the Commissioner of Mental Hygiene which need to be addressed. Chapter II of the rules is entitled "All Facilities" and bears the following notation:

> Note: The provision of this Chapter apply to all facilities in the Department of Mental Hygiene and to all facilities having an operating certificate from the department, unless the context indicates otherwise. Unless the regulation clearly indicates that it applies to outpatient facilities, this Chapter shall be deemed to apply to inpatient facilities only.

Subchapter A is entitled "Admission and Transfer of Patients". Part 15 is entitled "Admission and Retention of Patients". The part governs full time inpatients or residents. Part 17 is entitled "Transfer of Patients". The part governs the transfer of patients from one inpatient facility to another inpatient facility. Section 17.7 entitled "Transportation of a Female Patient" provides:

> (See Mental Hygiene Law, § 15.17) In consultation with the patient, the treatment team shall determine who may accompany a woman patient who is being transported to or from a facility. In permitting a woman or the patient's father, husband, brother or son to accompany her, the team must ascertain that there are no contraindications to granting such permission.

(14NYCRR 17.7).

From a reading of the statutory derivation and the accompanying rules of the Commissioner the Court finds that section 33.17 of the Mental Hygiene Law cannot be read so broadly as the plaintiff suggests as to apply to the daily transport of a client of a Sheltered Workshop program between

her home and the site of the program, as in the case at bar. In this regard, the Court finds the October 17, 2000 letter of Carol M. Kriss, Program Specialist at the Office of Mental Retardation and Developmental Disabilities (OMRDD) to be informative. OMRDD is responsible for enforcing the statutes and regulations as concern persons with mental retardation and developmental disabilities. In her letter to Margaret Groce, AHRC's liability expert, Ms. Kriss discusses the statutes which are the focus of OMRDD's concern and indicates that "[m]atrons or aides are only required on a vehicle if specified in a consumer's Individual Program Plan (IPP)". If section 33.17 were applicable, it is fairly inferable that OMRDD would be aware of it, have so advised Ms. Groce, and would not have a policy or program where a matron's use was dependent on an IPP and not the application of a statute.

The plaintiff has not established her entitlement to judgment as a matter of law on the issue of liability on the basis of a breach of statutory duty. The Court having found that section 33.17 does not apply and that there is no breach of duty which may constitute negligence per se, there is no need for this Court to address the issues of proximate causation and foreseeability. Accordingly, a denial of the plaintiff's motion for summary judgment on the issue of liability is warranted.

Towne Bus cross moves for summary judgment on the issue of liability. Towne Bus argues that there is no evidence to support the plaintiff's claim that Towne Bus negligently hired, supervised or retained its bus driver, Mark Britton, who allegedly sexually molested Denise Giangrasso on April 7, 1993; that there is no evidence to support the plaintiff's contention that Towne Bus knew, or should have known, that Mark Britton had a propensity to commit such an act, and that Towne Bus could not be held liable under the theory of respondeat superior in that the alleged criminal offense was an intentional act clearly committed outside the normal duties and scope of a bus driver's employment. By Order dated September 27, 1996, this Court ruled that there was no basis for the vicarious liability of Towne Bus for the intentional tort committed by an employee solely for personal motives unrelated to the furtherance of the employer's business (citing ***Kirkman v. Astoria Gen. Hosp.,*** 204 AD2d 401, 611 NYS2d 615 [1994] and ***Heindel v. Bowery Savings Bank***, 138 AD2d 787, 525 NyS2d 428 [1988]).

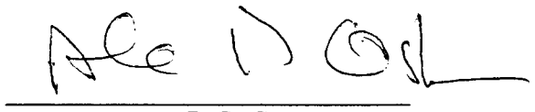
The Court also ruled that there are genuine issues of material facts presented as to the negligent hiring and/or negligent retention of Mark Britton which requires denial of Towne Bus' motion for summary judgment. On the present application, Towne Bus makes the same arguments and refers to the same evidence as submitted on the prior application. Accordingly, reconsideration is barred by the doctrine of law of the case (see ***Kowalski v. Sem Intl., LLC.,*** 278 AD2d 371, 718 NYS2d 624 [2000]; ***Prato v. Vigliotta,*** 277 AD2d 214, 715 NYS2d 865 [2000]) and a denial of the motion is warranted.

The defendant AHRC cross moves for summary judgment on its cross claim for indemnification against the co-defendant, Towne Bus. The application is denied.

The plaintiff moves to reargue her application for expanded disclosure of incident reports denied by this Court in its opinion dated July 5, 2001. The plaintiff argues that notwithstanding the Court's preclusion of the testimony of her expert, Dr. Dragan, the information sought to be obtained in the expanded disclosure will be necessary to establish her case, particularly the issue of foreseeability. The plaintiff also argues that the waiver of the expanded discovery discussed at the May 3, 2001 hearing was conditioned upon the defendants not objecting to Dr. Dragan's basing an opinion on them at trial, should the Court permit Dr. Dragan's testimony. The plaintiff states that because not all of the incident reports contain the names of the bus drivers even if expanded discovery is permitted, it will not be as informative and useful as it should be. Additionally, the plaintiff argues that this raises questions as to the adequacy of record keeping, and the possible need for further discovery to try to identify a driver from hand writing or a supervisors recollection. Moreover, this Court recalls discussing various means of expanded discovery at the May 3, 2001 hearing, which would have afforded the plaintiff additional information to present her case without infringing upon the privacy rights of AHRC clients. The Court finds that the plaintiff may well be entitled to further disclosure of the incident reports so as to be able to appropriately present her case. The need for discovery and the parameters thereof will be addressed at the conference directed herein.

E N T E R

DATED: January 30, 2002



J.S.C.