

IN THE COURT OF APPEALS OF IOWA

No. 6-321 / 05-1264

Filed July 12, 2006

**DEANNA S. JOHNSON, Individually, and
DEANNA S. JOHNSON, as Parent and Next
Friend of NATHAN JOHNSON,**
Plaintiffs-Appellants,

vs.

**DAVID C. SHERMAN, IOWA COACHES, INC.,
and its successor,**
Defendants-Appellees.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley,
Judge.

Plaintiff appeals from the district court's grant of summary judgment in favor
of defendants. **AFFIRMED.**

Mark Roeder of Roeder & Rattenborg, and E. Michael Carr of Carr & Carr,
Manchester, and David Dutton of Dutton, Braun, Staack & Hellman, P.L.C.,
Waterloo, for appellant.

Mark McCormick of Belin Lamson McCormick Zumbach Flynn, P.C., Des
Moines, Edward Krug of Krug Law Firm, P.L.C., Cedar Rapids, and Douglas Rennie
and Janet Self of Montgomery, Rennie & Johnson, Cincinnati, Ohio, for appellees.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

SACKETT, C.J.

Plaintiff, Deanna Johnson, was shot by Jerry Cole, an employee of defendant, Iowa Coaches, Inc. Defendant, David Sherman, was the president and sole stockholder of Iowa Coaches. Plaintiff appeals from the district court's orders granting defendants' motions for summary judgment and denying plaintiff's motion to amend or enlarge. Plaintiff contends the district court erred (1) in granting summary judgment to Iowa Coaches on grounds it was administratively dissolved and the statute of limitations had expired; (2) in holding defendants owed no duty to the public to exercise ordinary care in the storage and safekeeping of a firearm and ammunition; (3) in granting summary judgment on her negligent hiring, retention, and supervision claim; (4) in holding Cole's actions were not a proximate cause of plaintiff's damages, (5) in holding Cole's actions were an intervening, independent cause; and (6) in denying plaintiff's motion to amend or enlarge.

I. BACKGROUND.

Prior to the incident that gave rise to this case, Iowa Coaches, Inc. was a tour and charter bus business. David Sherman was the owner and chief operating officer. Sometime in 1985 or 1986, he purchased a pistol and kept it in a drawer under some hanging folders in a safe in his office at Iowa Coaches. As it turned out, Sherman had no occasion to use the pistol and eventually forgot it was in the safe.

In March of 1990, Iowa Coaches hired Cole as a bus driver. As required by U.S. Department of Transportation regulations, a background investigation and a drug screen was performed on Cole. Over time, he became a trusted employee and was promoted from bus driver to manager. Eventually, he became the general manager for Iowa Coaches and was given the combination to the safe as a result.

Thirteen years prior to the shooting that is the subject of this action, Cole pled guilty to a felony menacing offense in Colorado for wielding a weapon in the face of his then wife, Kay Cole. He was placed on probation in Colorado. His probation ended in May of 1990, two months after he started working at Iowa Coaches.

Seven years later, in 1997, Cole was committed briefly to a mental health unit as a result of his current wife, Eliza Cole, filing an affidavit in support of a mental health commitment. The reason for the commitment application was a letter she received from Cole in which he discussed having thoughts of hurting her. In June of 2000, Cole was charged with simple misdemeanor domestic assault after attacking his wife, Eliza. He was placed on probation and required to attend a batterer's education program.

In August of 2000, Iowa Coaches, Inc. was administratively dissolved by the Secretary of State's office for failure to file a required biennial report for the year 2000.

In January of 2001, while searching for paperwork in the Iowa Coaches safe, Cole pulled on a drawer and heard a clunking noise. When he looked to see what the noise was, he found the pistol Sherman had placed there in 1985 or 1986. Sometime in early March, Cole stole the pistol and ammunition from the safe. On the morning of April 11, 2001, Cole was to represent Iowa Coaches at a small claims hearing in Davenport. He purchased and consumed a twelve-pack of beer during the drive to Davenport and then purchased a second twelve-pack of beer on the drive back to Dubuque later that evening. At approximately 7:30 that evening, Cole approached and shot two complete strangers in a deserted parking lot.

Plaintiff filed suit in March of 2003. In July and August of 2004, defendants moved for summary judgment. Plaintiff resisted. In September the court granted defendants' motions for summary judgment. The court ordered:

1. The Defendant Iowa Coaches, Inc. does not exist as a matter of law as a result of the Secretary of State's administrative dissolution of the corporation. Therefore, any cause of action alleged against this non-existent entity cannot be pursued.

2. As to the claim for wrongful employment and retention of an employee, Defendant David Sherman's Motion for Summary Judgment is hereby GRANTED. The Plaintiffs are not able to prove that a duty existed to Deanna Johnson in the employ of Jerry Cole, Jr.

3. As to the negligent safeguarding of a weapon, Defendant David Sherman's Motion for Summary Judgment is hereby GRANTED. There is no heightened standard of care recognized in the State of Iowa to impose a duty on Mr. Sherman. Also, Plaintiffs cannot establish proximate cause in light of the superseding intentional actions of Mr. Cole.

II. SCOPE OF REVIEW.

Review of a district court's ruling on a motion for summary judgment is for correction of errors at law. Iowa R. App. P. 6.4; *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 677 (Iowa 2004). Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Grinnell Mut. Reins. Co. v. Jungling*, 654 N.W.2d 530, 535 (Iowa 2002). A reviewing court views the evidence in the light most favorable to the nonmoving party and allows that party all reasonable inferences that can be drawn from the record. *Wernimont v. Wernimont*, 686 N.W.2d 186, 189 (Iowa 2004).

III. ANALYSIS.

Cole's actions as an intervening or superseding cause. Plaintiff contends the court erred in concluding Cole's "conduct was an intervening independent cause

so that any negligence of having the gun in the safe at the office cannot be considered a proximate cause of Ms. Johnson's injury." "[A] defendant's conduct is not a proximate cause of a plaintiff's harm if it is superseded by later-occurring independent forces or conduct." *Berte v. Bode*, 692 N.W.2d 368, 374 (Iowa 2005). An event or conduct constitutes a superseding cause if the court finds that "the later-occurring event is such as to break the chain of causal events between the actor's [conduct] and the plaintiff's injury." *Hayward v. P.D.A., Inc.*, 573 N.W.2d 29, 32 (Iowa 1997).

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Restatement (Second) of Torts § 448, at 480 (1965).

Plaintiff argues Cole's actions should not be considered a superseding cause because they were foreseeable because of his history of domestic violence. The district court found:

One could conclude Mr. Cole was having marital problems and he sought counseling for that. However, there was no evidence offered to convince the court that David Sherman or Iowa Coaches, Inc. would have any reason to believe that Mr. Cole would use a weapon almost completely forgotten about, and maintained within a locked safe on the premises of Iowa Coaches, Inc., to shoot a complete stranger. From the evidence, one could not conclude that Mr. Sherman could foresee that the 1987 conduct of Mr. Cole could resurface against a stranger.

The stronger argument would exist if Mr. Cole had used the weapon to shoot a member of his family, to whom previous acts of harm were pointed. . . . There was no evidence offered to indicate that Mr. Cole had stolen anything else from Mr. Sherman or Iowa Coaches, Inc., or that Mr. Cole had taken any property not owned by

him while employed at Iowa Coaches, Inc. There was no reasonable foreseeability that he would take the weapon on April 11, 2001.

Mr. Cole was highly intoxicated after having drunk a case of beer during the course of the day on April 11, 2001. He was sent to court as a representative of Iowa Coaches on that day. The ordinary reasonable person would assume that one would not consume alcohol before appearing in a courtroom. No evidence was offered to indicate the Mr. Sherman knew Mr. Cole was intoxicated or acting irrational.

We find substantial evidence supports the district court's conclusion Cole's actions were a superseding independent cause of plaintiff's injury, thus breaking the causal chain between the defendants and the plaintiff's injury. See *State ex rel. Miller v. DeCoster*, 596 N.W.2d 898, 903 (Iowa 1999) ("Legal causation will not be found if defendant's conduct is superseded by later independent forces or conduct.").

Because our resolution of this issue is dispositive, we need not address plaintiff's other claims concerning alleged negligence of the defendants.

Denial of motion to amend or enlarge. Plaintiff also contends the court erred in not amending or enlarging its findings, arguing the court did not view the evidence in the light most favorable to plaintiffs. See *Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 842 (Iowa 2005). The district court ruled:

The record and its extensive exhibits show specifically the nature of the events of the facts which took place prior to the incident, the nature of the events that took place on the date of the events, and no further findings of the court need be made.

We find no error in the district court's denial of plaintiff's motion.

AFFIRMED.