STATE OF MICHIGAN

COURT OF APPEALS

JAMES HARRIS II and JESSICA BRADLEY, Co-Personal Representatives of the ESTATE OF GARY HARRIS,

Plaintiffs-Appellees,

v

TONY LAMONT GATES,

Defendant,

and

JHOHMAN, LLC, doing business as LAGARDA SECURITY,

Defendant-Appellant.

UNPUBLISHED
May 30, 2024

No. 359672
Wayne Circuit Court
LC No. 20-003723-NZ

Before: GADOLA, C.J., and BORRELLO and N. P. HOOD, JJ.

PER CURIAM.

Defendant Jhohman, LLC ("Lagarda"), doing business as Lagarda Security, appeals by leave granted the trial court's denial of summary disposition regarding plaintiff's claims of negligence and vicarious liability.[1] The claims, and this case, arise from defendant Tony Lamont Gates shooting and killing plaintiff's decedent, Gary Harris, while working as a security guard for Lagarda. Despite Lagarda hiring Gates as an unarmed security guard, Gates began carrying a pistol during his shifts. During a midnight shift, Gates attempted to remove Harris from a property guarded by Lagarda, and after minimal interaction, shot and killed him. Plaintiff presented evidence that in the weeks leading up to the shooting Gates told two supervisors he was carrying a gun, a violation of Lagarda's policies and an explicit basis for termination. Plaintiff also

[1] *Estate of Harris v Gates*, unpublished order of the Court of Appeals, entered March 3, 2022 (Docket No. 359672).

presented evidence that these supervisors did nothing or possibly encouraged him to carry it. The trial court granted Lagarda's motion for summary disposition with respect to plaintiff's claim for negligent infliction of emotional distress, but denied summary disposition with respect to plaintiff's claims for negligence and vicarious liability. It found questions of fact regarding whether Gates's conduct was within the scope of his employment with Lagarda and whether the harm was foreseeable.

This case is about a security guard's use of force that killed someone. It is also about an employer's duty when an employee wrongfully carries a gun at work. A jury must decide whether he was acting within the scope of his employment and whether his employer was negligent in training, supervising, or retaining him. The jury must also determine whether Gates's supervisors knew he was carrying a gun. For these reasons, we affirm.

I. BACKGROUND

This case arises not only out of the shooting but out of Gates's employment with Lagarda. Both the shooting and Gates's employment were at the Sheridan Place I Apartments (Sheridan I), a residential senior citizens apartment complex operating under the umbrella of the Detroit Housing Commission (DHC). On November 5, 2018, Lagarda contracted with the DHC to provide uniformed, unarmed security guards at Sheridan I, among other DHC properties. As a DHC property, Sheridan I had a policy against weapons on the premises. The contract between DHC and Lagarda provided that guards would have 40 hours of training or pass a qualifying test and four additional hours of training before being assigned to a post. Lagarda management confirmed that the contract required its security guards to have 40 hours of training within 90 days of their hiring.

On October 31, 2018, Gates applied for a security officer position with Lagarda. His application and résumé however did not identify any prior security experience. During his interview, Gates informed the Lagarda representative that he had done security work for a local rapper. Lagarda hired Gates as an unarmed security guard the same day as his interview. Lagarda completed a criminal background check through the Internet Criminal History Access Tool, and it is undisputed that Gates had no adult criminal convictions, including convictions for shootings or homicides. But an individual involved with Gates's hiring indicated that they did not have time to review Gates's social media presence, despite requesting the information. Although Lagarda employs armed security guards, Gates was hired for an unarmed position. He began his first shift on November 2, 2018, at 11:00 p.m. He was assigned to his post at Sheridan I, which began at the start of the Sheridan I contract on November 5, 2018. Gates worked the midnight shift, which started at 11:00 p.m.

Before his assignment, Gates completed an orientation, which, outside of on-the-job training, was the only formal training Lagarda provided Gates. During orientation, Gates and other applicants (or new hires) watched a three-hour training video and completed a test. At a minimum, Gates and the other new hires were able to complete the test as they watched the video. According to Gates, a video played, but was skipped through quickly, so he was not able to watch it thoroughly or completely so as to learn anything. He acknowledged that he took a test, but he was given all the answers. He explained that Lagarda gave everyone taking the test the answers because Lagarda was trying to hire people as quickly as possible. It is unclear if the test operated

as a learning tool for training, or a screening tool to eliminate applicants. The record strongly suggests the latter.

Gates testified that Lagarda did not properly train him for the position, claiming that he was left to learn the job himself. Lagarda employees indicated that the majority of training was expected to be completed on the job, shadowing other guards. Gates claimed he did not receive on-the-job training. His position mostly involved checking individuals into the building and keeping an eye on the premises. According to Lagarda's witnesses, when dealing with trespassers, guards were instructed to call the police and management, make a report, and not to remove the trespasser. Gates however claimed Lagarda did not train him on how to deal with trespassers or with violent confrontations. Other Lagarda employees also testified to a lack of training, formal or otherwise.

Similarly, while Lagarda's witnesses testified that they reinforced the no-weapons policy with guards assigned to Sheridan I, Gates testified that he was not advised he was not allowed to carry a gun on the property. When he was hired, Gates signed multiple documents, including a document that provided that employees possessing unauthorized concealed weapons were subject to discharge. Lagarda's employment policy also provided that employees were not authorized to carry firearms or other weapons, and instructed not to use physical force on anyone in the course of their employment. Gates acknowledged that he signed documents related to his position but denied that he was given the opportunity to read any documents he signed at the time of his orientation.

In spite of Lagarda's policies, Gates carried a firearm during his shifts. Shortly after Gates began working for Lagarda, he applied for or was in the process of obtaining a concealed pistol license (CPL) and a firearm. He also purchased a .40-Smith & Wesson pistol.

According to Gates, he advised his supervisor, Connie Stringer, about his CPL and his interest in becoming an armed security guard because the pay was higher. He testified that he told Stringer he obtained his CPL and purchased a gun about a month before the shooting. According to Gates, Stringer did not tell him not to carry a gun at the site, but instead told him to keep it concealed "and make sure you take it with you when you do runs." He testified that Stringer thought it was a good idea for him to have a gun and CPL because he could receive more money and because his worksite was dangerous. Stringer acknowledged that Gates told her that he intended to take classes to obtain a CPL and purchase a gun, and she testified that she did not discuss this with her supervisors. She disputed other aspects of Gates's account, stating that Lagarda informed him that the site did not allow weapons and that she worked with Gates on how to deal with trespassers.

Gates claimed another manager, Derrick Hodges, also knew he was armed. Hodges assisted the operations manager for Sheridan I and was responsible for performing on-site training. Gates testified that Hodges told Gates it was okay to have his gun at work because it was a dangerous area, and Gates rode a bus late at night. According to Gates, Hodges told him he could carry the weapon as long as it was concealed and Gates was not "flashy" about it. In sum, Lagarda staff denied knowing that Gates carried a gun, but Gates testified that he told superiors and they did nothing or encouraged him to conceal it while at work. This critical fact remains in dispute.

Gates shot and killed Harris shortly after reporting for the midnight shift on February 9, 2019, 109 days after he was hired.[2] The previous evening, Gates worked a double shift, beginning at 11:00 p.m. Friday, February 8 and ending at 3:00 p.m. on Saturday, February 9. He returned to work at 10:30 p.m. According to Gates, he was not scheduled for the shift, but he was told he would be fired if he did not work that shift. Gates admitted that he was tired and "not at my best" when he arrived for the midnight shift on February 9.

The night of the shooting Gates did not have a cell phone. Although Lagarda generally provided guards with a company cell phone, Gates did not receive one when he arrived to work on February 9. Gates's personal cell phone had no service because he had not paid his monthly bill. Shortly after starting his shift, Gates saw something on the monitor for the fourth-floor hallway and went to investigate. When he arrived at the fourth floor, Gates found Harris sleeping on the floor. Gates woke Harris up, determined that he was not a Sheridan I resident, and asked him to leave. Gates did not call the police or a supervisor because he did not have a work phone and his personal phone service was cut off.[3]

Harris initially resisted leaving, but Gates was eventually able to escort him to the elevators. Gates did not turn his back to Harris as they made their way to the elevator because Gates was not sure if Harris was armed. According to Gates, Harris walked up close to him and threatened to harm him with a knife. Harris had his hands in his pocket while he made the threat. He also threatened to bring other people back with him and identified a gang he said he was affiliated with.

Gates got Harris onto an elevator, but Harris twice returned to the fourth floor and exited the elevator, and again threatened to harm Gates. According to Gates, after again exiting the elevator, Harris approached Gates, who told him to get back and pointed his gun at Harris. When Harris continued to approach Gates with his hand in his pocket, Gates fired a shot that struck Harris in the abdomen. Gates promptly called for emergency assistance, and police arrested him at the scene. Harris died from the gunshot wound a few hours later. Gates was criminally charged and pleaded no contest to second-degree murder and possession of a firearm during the commission of a felony. During his deposition, he maintained that he acted in self-defense. His no-contest plea was a waiver of any such defense.

Plaintiff filed the amended complaint in April 2020. The complaint raised four counts against Gates and Lagarda: assault and battery (Count 1); negligent hiring, retention, training, and supervision (Count 2), gross negligence (Count 3), and negligent infliction of emotional distress (Count 4). Plaintiff alleged that Lagarda was vicariously liable for Gates's conduct.

Lagarda moved for summary disposition. It argued in its motion for summary disposition that it was not directly or vicariously liable because Gates was prohibited from carrying and

[2] According to Gates, he had not received 40 hours of training, formal or on-the-job training, between his start date and the night of the shooting.

[3] Although Gates had his personal cell phone, he did not realize that he could still use the phone to make an emergency call even though his service was not activated.

concealing a firearm while on duty, and there was no genuine issue of material fact that Gates was acting outside the scope and course of his employment when he shot Harris. Lagarda contended that it was not foreseeable that Gates would intentionally commit a criminal assault, and therefore, it could not be liable for negligence in the hiring, training, retention, or supervision of Gates because it had no actual or constructive knowledge that Gates would commit that type of assault.

In a written opinion, the trial court denied in part and granted in part summary disposition. The trial court held that there were genuine issues of material fact that precluded summary disposition of plaintiff's negligence and vicarious liability claims under MCR 2.116(C)(10), and therefore, denied Lagarda's motion with respect to those claims. However, the court dismissed an additional claim for negligent infliction of emotional distress under MCR 2.116(C)(8) because no member of Harris's family observed this incident. In denying Lagarda's motion related to vicarious liability, it found that plaintiff presented sufficient evidence to create a question of fact as to whether Gates's conduct was within the *scope* of his employment. Finding a question of fact regarding *scope*, the trial court did not address foreseeability of conduct outside of the scope of employment. The trial court also found that there were questions of fact regarding Lagarda's negligent retention, training, and supervision of Gates. It focused on the fact that Gates testified that he told two supervisors that he was carrying a gun at work, a violation of Lagarda and DHC's policies, but those supervisors did nothing or encouraged him to conceal it. The court was silent on whether Lagarda negligently hired him or acted with gross negligence.

This Court granted Lagarda's application for leave to appeal the trial court's denial of summary disposition with respect to the negligence and vicarious liability claims. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *El-Khalil v Oakwood Healthcare Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). Largarda moved for summary disposition of plaintiff's direct-liability negligence claims under MCR 2.116(C)(10) and the trial court reviewed those claims under that subrule. A motion under MCR 2.116(C)(10) "tests the factual sufficiency of a claim." *El-Khalil*, 504 Mich at 160 (emphasis omitted). In considering a motion under MCR 2.116(C)(10), the trial court "must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*. Such a motion "may only be granted when there is no genuine issue of material fact." *Id*. "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id*. (quotation marks and citation omitted).

III. VICARIOUS LIABILITY

Lagarda argues that the trial court erred by denying its motion for summary disposition of plaintiff's claim that it is vicariously liable for Gates's assault on Harris. More specifically, Lagarda argues that the trial court applied the wrong framework when assessing the motion for summary disposition as it relates to vicarious liability. We disagree. At the outset, Lagarda incorrectly describes *Hamed v Wayne Co*, 490 Mich 1; 803 NW2d 237 (2011) as providing a two-step inquiry to determine if conduct is "foreseeable" in the context of vicarious liability claims. This is incorrect, or at least incomplete. See *id.* at 12. Instead, here, the trial court correctly

identified the two ways in which an employer may be held vicariously liable for the torts of its employee: (1) when the conduct falls with the *scope* of the employment, *id*. at 11; or (2) when the conduct falls outside of the scope of the employment, but is *nonetheless foreseeable*, *id.* at 12. The trial court then concluded that a jury question remained as to whether Gates's conduct fell within the scope of his employment and denied the motion on that basis without addressing foreseeability. This conclusion was correct because generally the question of scope is left to the jury. *Bryant v Brannen*, 180 Mich App 87, 102-103; 446 NW2d 847 (1989). Because the trial court concluded that questions of fact existed regarding scope of employment, it was not required to address foreseeability. See *Ammex, Inc v Dep't of Treasury*, 277 Mich App 13, 22 n 9; 742 NW2d 617 (2007) (declining to address remaining issues after concluding that one issue was dispositive). Even if it had continued to the alternative argument, foreseeability, the result should have been the same.

A. SCOPE OF EMPLOYMENT

First, the trial court correctly concluded that there is a jury question related to whether Lagarda is vicariously liable for Gates's conduct because his conduct fell within the scope of his employment as a security guard with Lagarda. "The doctrine of respondeat superior is well established in this state: An employer is generally liable for the torts its employees commit within the scope of their employment." *Hamed*, 490 Mich at 10-11 (citations omitted). Our Supreme Court has defined "within the scope of employment to mean engaged in the service of his master, or while about his master's business." *Id*. at 11 (quotation marks omitted). On the other hand, when an employee engages in "independent action, intended solely to further the employee's individual interests" they are not acting within the scope of employment. *Id.*, citing 2 Restatement Agency, 3d, § 7.07, p 201. See also *Bryant*, 180 Mich App at 98. But when an employee acts contrary to an employer's instruction, liability will still attach "if the employee accomplished the act in furtherance, or [in] the interest, of the employer's business." *Hamed*, 490 Mich at 11. See also *Barnes v Mitchell*, 341 Mich 7, 15-16; 67 NW2d 208 (1954) ("The servant is within the scope of his employment when he is engaged in the master's service and furthering the master's business though the particular act is contrary to instructions."). The question, therefore, is whether at the time of the conduct, the employee had the employer's business in mind. See *Cook v Michigan Central R*, 189 Mich 456, 459-460; 155 NW 541 (1915) (holding that there was a jury question on scope of employment, where a night watchman shot and killed the plaintiff's decedent while attempting to remove decedent from the defendant-employer's railyard). Regarding the inquiry into scope of employment, our Supreme Court has stated:

> The purpose of the service rendered by the employee, and not the method of performance, is the test of whether or not the servant is within the scope of his employment. If the purpose is to further the master's business and not that of the servant, the latter is within the scope of his employment though he be negligent or disobeys orders as to the method of its execution." [*Barnes*, 341 Mich at 16 (quotation marks omitted).]

The Court also recognized the rationale for this test: "If it were true that a servant is outside the scope of his employment whenever he disobeys the orders of his master, the doctrine of respondeat superior would have but scant application, for the master could always instruct his servant to use ordinary care under all circumstances." *Id.* at 15 (quotation marks omitted).

To that end, in the context of employees who are responsible for securing their employer's premises, "[i]t is also the rule that if the servant uses more force than he was authorized to use in evicting a party from his master's premises, the master is liable." *Stewart v Napuche*, 334 Mich 76, 79; 53 NW2d 676 (1952). See also *Cook*, 189 Mich at 462 (quotation marks and citation omitted) ("The master who puts the servant in the place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury."). "An act may be within the scope of employment although consciously criminal or tortious." *Bryant*, 180 Mich App at 100, quoting 1 Restatement Agency, 2d, § 231, p 512.

Generally, the issue of whether an employee was acting within the scope of their employment is a question for the trier of fact. See *Bryant*, 180 Mich App at 98. But the trial court may decide the issue as a matter of law when it is clear that the employee was acting to accomplish some purpose on his own. *Id*. ("For example, an employee may act to gratify some personal animosity or to accomplish some purpose of his own."). See also *Marin v Jones*, 302 Mich 355; 4 NW2d 686 (1942) (affirming grant of judgment notwithstanding verdict where a gas station manager shot the plaintiff, a customer, holding that the manager had not shot to protect his employer's property or advance the employer's business interest, and it was not one of the manager's duties to be armed). In determining whether an employee was acting within the scope of his or her employment, a court must consider the duties and authority of the employee. See *Cook*, 189 Mich at 458; *Bryant*, 180 Mich App at 99-102. We have often relied on factors provided in the Restatement on Agency, which provides that "[t]o be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized," or "although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment." *Bryant*, 180 Mich App at 99-100, quoting 1 Restatement Agency, 2d § 229, p. 506. More specifically, to hold an employer liable for an employee's shooting, "the employee could in some way have been held to have been promoting his master's business or else the employee's duties included the duty of carrying a firearm." *Bryant*, 180 Mich at 99. See also *Stewart*, 334 Mich at 79-81; *Cook*, 189 Mich at 459-460.

Contrary to Lagarda's arguments, the trial court correctly analyzed the issue of whether the alleged conduct was within the *scope* of Gates's employment. It correctly relied on principles stated in *Bryant* and *Hamed* for analyzing vicarious liability through the lens of (1) conduct within the scope of employment, and (2) conduct that is outside of the scope of employment but is nonetheless foreseeable. In doing so, it noted that Gates's testimony alone was instrumental, stating:

- Gates testified that on the night at issue he observed an individual who he thought was a trespasser (Mr. Harris) in the building. He went to the fourth floor consistent with his job duties to ask the trespasser to leave the building.

- Gates testified that he was acting on behalf of his employer while attempting to get Mr. Harris to leave the building and was not acting for himself or for his own self-interest.

Relying on this evidence, the trial court concluded, "there is substantial evidence to warrant review by a jury . . . ." This was not wrong. See *Cook*, 189 Mich at 459-460 (the critical inquiry, as to whether a tort fell within the scope of employment, is whether at the time of the conduct, the employee had the employer's business in mind).

This is true even for conduct, like Gates's, that amounts to a crime. See *id.* As stated, a consciously criminal or tortious act may still be within the scope of employment (even before we get to foreseeability). See *Bryant*, 180 Mich App at 100. Historically, we have observed that an employer can reasonably anticipate that an employee "may commit minor crimes in the prosecution of the business." *Id.* at 101, quoting 1 Restatement Agency, 2d, § 231, p 512.[4] See also *id.* at 102; Restatement Third of Agency, § 7.07. But more serious crimes are usually outside of the scope of employment. See *Bryant*, 180 Mich App at 100, 102 (employer not liable for building manager who shot a resident from his own apartment outside of working hours). See also *Mueller v Brannigan Bros Restaurants & Taverns, LLC*, 323 Mich App 566, 572-573; 918 NW2d 545 (2018) (employer not liable for homicide, where a former employee, who had just quit, and current employee, who was off shift, chased a patron into the street and killed him). But see *Stewart*, 334 Mich at 78-81 (employer bar owner was vicariously liable for injuries resulting from bartender's strike and grappling hold on a disruptive patron); *Cook*, 189 Mich at 458 (question of fact as to whether homicide was within the scope of employment). For example, our courts have consistently and reasonably concluded that sexual assault is never within the scope of employment. See *Hamed*, 490 Mich at 11; *Brown v Brown*, 478 Mich 545, 552-558; 739 NW2d 313 (2007). Under the aforementioned principles, this is rational because sex acts–let alone sexual assault–will almost always be outside of the scope of lawful employment. *Hamed*, 490 Mich at 11. Consistent with this framework, "Michigan cases have imposed liability on employers whose servants committed simple batteries while repossessing property, collecting money from a patron, or ejecting a patron from a bar." *Bryant*, 180 Mich App at 102 (citations omitted). See also *Stewart*, 334 Mich at 78-81; *Dobos v Wu*, unpublished per curiam opinion of the Court of Appeals, issued November 23, 2021 (Docket No. 353926) (reversing trial court decision granting summary disposition to employer, a Meijer grocery store, where its cashier, whose duties did not include breaking up fights, injured patrons while breaking up a fight; concluding a question of fact existed as to whether he was acting within the scope of employment). "Our Supreme Court has also held that where a night watchman, who carried a revolver, killed someone he believed was going to do damage to his employer's property, it was for the jury to determine whether he was acting in the scope of his employment." *Bryant*, 180 Mich App at 103, citing *Cook*, 189 Mich at 458. Thus, while the extremity of a tort or crime is one aspect of the inquiry, the central question remains whether the conduct fell within the scope of employment.

In *Stewart*, our Supreme Court held that a tavern owner was vicariously liable for the conduct of a bartender who severely injured a patron during his shift. *Stewart*, 334 Mich at 77-81. There, the bartender refused to serve an intoxicated patron. *Id.* at 78. In response, the patron made

[4] We observe that several of the examples on which we have relied as involving "minor" crimes, i.e., a chauffeur driving on the left side of the road, or a gardener assaulting a trespassing child with a stick, may be outdated and no longer considered minor. Cf. *Bryant*, 180 Mich App at 99-101.

a remark "which apparently angered" the bartender, who struck him, walked around the bar, put him in a grappling hold (specifically a full nelson) that resulted in severe injuries, the loss of five months' work, and medical bills. *Id.* at 78-79. At the close of the plaintiff's proofs at trial, the bar owner moved for a directed verdict on the basis that the bartender "was not acting within the scope of his authority when he committed the assault upon [the] plaintiff." *Id.* at 79. The trial court denied the motion, and our Supreme Court affirmed. *Id.* at 79-81. Our Supreme Court held, "It is a general rule that the master is liable for the acts of a servant while the servant is acting within the scope of his employment" and "[i]t is also the rule that if the servant uses more force than he was authorized to use in evicting a party from his master's premises, the master is liable." *Id*. at 79. Noting the difficulty in separating the act of the servant from the act of the individual in such cases, our Supreme Court held "When there is doubt, it will be resolved against the master, upon the ground that he set in motion the servant who committed the wrong." *Id.* Despite the egregious conduct and harm, the Court concluded that there was competent evidence to support the findings of fact of the trial court that the actions of the bartender were in furtherance of the bar owner's business. *Id.* at 81 ("The fact that [the bartender] used more force than was necessary does not change the rule of liability of the master.").

The Court in *Stewart* relied on our Supreme Court's prior holding in *Cook*, an even more egregious case. See *Stewart*, 334 Mich at 79-80, citing *Cook*, 189 Mich at 456. In *Cook*, a night watchman shot and killed two men while working a shift at a freight yard. *Cook*, 189 Mich at 457. The plaintiff, the widow and administrator of one of the men's estate, sued the railroad company that employed the night watchman. *Id.* at 457-458. After the plaintiff's proofs, the trial court granted the employer's motion for a directed verdict "on the ground that it had not been made to appear that [the night watchman] was acting within the scope of his employment at the time of the shooting." *Id.* at 458 (noting that the employer claimed that the watchman's acts were purely self-defense, i.e., not in the service of his employer). On appeal, our Supreme Court restated the rule that "the master is liable for the negligence of a servant while acting as such and within the scope of his employment," a principle on which both sides agreed (as is the case here). *Id.* at 459. Acknowledging the difficult application of such principle to a case involving a homicide, the court clarified the inquiry as follows:

> The test in such cases appears to be: Did Burnett at the time have in mind the furtherance of his master's business? If he did, then the master is liable, whether the act was done negligently or recklessly. If he did not have in mind the furtherance of his master's business, but only his own self-preservation, then the master is not liable. [*Id.* at 459 (citations omitted).]

After restating the facts, which involved the watchman attempting to forcibly eject the decedents, a brief struggle before the shooting, and a questionable claim of self-defense, our Supreme Court held that there were "questions of fact which ought to be determined by a jury" and reversed the directed verdict. *Id*. at 460-461.

Here, like *Stewart* and *Cook* the facts are messy. As the trial court observed, Gates's testimony indicates that he responded to the fourth floor of Sheridan I as part of his job responsibilities. He testified that he believed he was there on his employer's business. Although other facts suggest that Gates was trained not to remove trespassers, and instead call the police, and not to carry a firearm at work, still other evidence conflicts with descriptions of how Lagarda

purported to train its employees and whether Gates's managers allowed him to carry a gun. Most notably, this includes Gates's testimony that he specifically recalled Stringer telling him to take his gun on "runs." The trial court reasonably, albeit succinctly, concluded that there is a question of fact as to whether his conduct fell within the scope of his employment.

The other cases on which Lagarda relies are distinguishable. Neither of the more recent cases, *Hamed* and *Brown*, dealt with scope of employment because the conduct at issue was "clearly" outside of the scope of employment: namely, a sexual assault. See *Hamed*, 490 Mich at 11 ("Here, there is no question that [employee's] sexual assault of plaintiff was beyond the scope of his employment as a deputy sheriff."); *Brown*, 478 Mich 545. Both cases immediately analyzed foreseeability, instead of addressing scope, because as stated, a sexual assault is never within the scope of employment. See *Hamed*, 490 Mich at 11. The closer case, *Bryant*, is distinguishable for the same reason: the conduct was clearly outside of the scope of employment. See *Bryant*, 180 Mich App at 90-92, 102-104. There, the building super, who was also a tenant, shot at another tenant who was hammering on the door to his own apartment. *Id.* at 90-92. We concluded that there was no issue of material fact regarding scope, because the super was not working a shift when he shot his firearm, he shot the firearm from his own apartment, there was ample evidence that the shooting was the result of a personal grievance, and there was no dispute about his authority to carry a firearm–he had none. See *id*. at 103-104. See also *Mueller*, 323 Mich App at 572-573. Here, as the trial court observed, Gates was working his shift. He went to the fourth floor to remove a trespasser, part of his responsibilities. And according to his testimony, he was about his employer's business at the time of the shooting. There are questions as to whether his managers knew he carried a firearm and authorized him to do so.[5] And while the shooting absolutely was "the use[] [of] more force than he was authorized to use in evicting a party from his master's premises," the master (or employer) may still be liable. See *Stewart*, 334 Mich at 79, citing *Cook*, 189 Mich at 456.

B. FORESEEABILITY

The trial court did not err when it resolved the motion by concluding questions existed as to whether the conduct was within the scope of employment. This conclusion was sufficient and did not require the trial court to address an alternative basis of vicarious liability: if the conduct were outside of the scope of employment, would Lagarda nonetheless be liable because it was foreseeable. The trial court reasonably resolved the motion on the question of the scope of Gates's employment. Simply put, if there is a question of fact regarding whether conduct was within the scope of Gates's employment, then the court need not reach the issue of foreseeability, which is

[5] One the one hand, Gates signed documents indicating that he understood that he should not carry a gun. His testimony however raises a question regarding the actual practice. According to Gates, two managers, at least one of whom was responsible for his training, knew he carried a gun and told him to keep it under wraps. Likewise, Lagarda signed documents indicating that Gates, like its other employees working at Sheridan I would receive a baseline level of training. Gates and several Lagarda employees indicated that they never received such training. In short, the documents in this case conflict with the testimony of the witnesses, and reasonably a genuine question of fact arises.

an exception to the general rule. See *Ammex, Inc*, 277 Mich App at 22 n 9 (declining to address remaining issues after concluding that one issue was dispositive). See also *Stewart*, 334 Mich at 79-80 (addressing only scope); *Hamed*, 490 Mich at 10-13 (addressing only foreseeability when conduct was obviously outside of the scope of employment). But had the trial court reached the question of foreseeability, the result should have been the same.

Again, the general rule is that an employer is liable for the employee's conduct when it falls within the scope of their employment. See *Hamed*, 490 Mich at 11-12. But, our Supreme Court has observed:

> The general rule that an employer is not liable for acts of its employee outside the scope of its business, however, does not preclude vicarious liability in every instance. This Court has consistently recognized that an employer can be held liable for its employee's conduct if "the employer 'knew or should have known of [the] employee's propensities and criminal record ' " before that employee committed an intentional tort. This inquiry involves an analysis of whether an employer had *(1) actual or constructive knowledge of prior similar conduct and (2) actual or constructive knowledge of the employee's propensity to act in accordance with that conduct*. Under this two-pronged approach, the conduct at issue may be so close in time to prior similar conduct that knowledge under the first prong gives rise to a valid inference that the conduct was foreseeable under the second prong. Conversely, if an employee's actions were temporally distant and the employee's recent record suggested a change in character, foreseeability would not be established. [*Id.* at 12 (citations omitted).]

To simplify and shorten, an employer may still be liable for conduct outside of the scope of employment if the employer has knowledge of (1) the employee's prior similar conduct and (2) the employee's propensity to act in accordance with that prior conduct. See *id.* As stated, this exception to the general rule is where Lagarda's argument starts. Because the trial court resolved Lagarda's motion on the issue of scope, it did not reach the exception to the general rule.

Had the trial court reached this question, the correct result would still be a denial of Lagarda's motion because there are fact questions regarding both prongs of the foreseeability analysis. First, Gates told two of his supervisors (at least one of whom was responsible for his training) that he was carrying a firearm at work. If true, this would satisfy both prongs: it establishes (1) Gates's prior conduct of carrying a gun in violation of company policy and the rules for Sheridan I, and (2) Gates's intention to continue doing so. The fact that he told superiors, if true, would establish Lagarda's knowledge. Of course, this requires us to consider the framing of the specific bad conduct at issue. When an employer knows an employee has a habit of carrying a gun at work when he is not supposed to, it makes torts related to the wrongful carrying of that gun foreseeable. Even without prior incidents of shootings or brandishings, an employee carrying a gun to a gun-free workplace or a student carrying a gun to a school makes it foreseeable that at some point the gun will go off. Put simply, the wrongful carrying of a gun is enough.

If instead we read this rule to require actual or constructive knowledge that Gates had previously murdered someone, or previously shot someone, then Lagarda would not be liable. Further, under such a test, it is unlikely that any employer would ever be liable for a homicide,

even in the case of a night watchman shooting someone. This is not the rule. See *Cook*, 189 Mich 457-459 (fact question regarding employer's vicarious liability for homicide despite no history of shooting or killing). See also *Brown*, 478 Mich 545, 554-557; 739 NW2d 313 (2007) (stating that an employer's knowledge of an employee's threat of rape would be sufficient to establish vicarious liability under foreseeability exception). In *Brown*, our Supreme Court clarified the outer limits of the foreseeability analysis. There, the Court held that an employer's knowledge of its security guard's "lewd" and sexually charged comments to a coworker did not make his later rape of the coworker foreseeable. *Brown*, 478 Mich at 554-556. In so holding, the Court clarified, "We do not hold that an employee's words alone can *never* create a duty owed by the employer to a third party. This obviously would be an entirely different case if [the security guard] had threatened to rape plaintiff and defendant was aware of these threats and failed to take reasonable measures in response." *Id.* at 555. So, is carrying a gun in violation of company policy and DHC rules closer to a "lewd" comment, or closer to a threat? We conclude it is the latter. The reality is there is a question as to whether Lagarda knew that Gates had carried a firearm in violation of its rules and DHC's prohibitions and whether Lagarda knew of his propensity to do so. An employer who knows one of its employees carries a firearm unlawfully or in violation of company policy is potentially liable for the harms that result from the wrongful firearm possession: that the employee might use the gun he is already wrongfully carrying. Had the trial court reached this question, the result would have been the same: denial. We find no error with the trial court's analysis of this issue.

IV. DIRECT LIABILITY FOR NEGLIGENT HIRING, RETENTION, TRAINING, AND SUPERVISION

Lagarda also argues that the trial court erred by denying its motion for summary disposition with respect to plaintiff's claims involving Lagarda's direct liability for negligent hiring, training, retention, and supervision. In substance, Lagarda argues that it did not owe Harris a duty because it was not reasonably foreseeable that Gates would shoot or kill him. We again disagree. This issue conceptually overlaps with the foreseeability analysis for vicarious liability. *Mueller*, 323 Mich App at 574-576. And for similar reasons, we conclude that there is a genuine fact question of whether Lagarda knew Gates was wrongfully carrying a firearm leading up to the shooting.

Count II of plaintiff's complaint alleged that Lagarda was directly liable for Harris's shooting death because it was negligent in its hiring, retention, training, and supervision of Gates. Plaintiff essentially claimed that Lagarda failed to perform an adequate background check and otherwise failed to personally evaluate Gates to determine that he was qualified to work as a security guard, including by failing to investigate his Facebook postings and other social media accounts, failing to properly train Gates on how to handle violent interactions or deal with trespassers, and failing to properly supervise Gates. Critically, plaintiff highlights negligent supervision after management or supervisory personnel became aware that he obtained his CPL and was wrongfully carrying a gun at work.

Like ordinary negligence, to prove a prima facie claim for negligent hiring, training, and retention, a plaintiff must prove four elements: (1) a duty owed; (2) breach of that duty; (3) causation, and (4) damages. *Brown*, 478 Mich at 552. This appeal turns on whether Lagarda owed Harris a duty as it relates to hiring, training, and continuing to employ Gates. Duty is a question of whether the relationship between the actor (Lagarda) and the injured person (Harris) gives rise

to a legal obligation on the actor's part for the benefit of the injured person. See *Brown*, 478 Mich at 552. When analyzing whether a duty existed, we consider the foreseeability of harm to the plaintiff. *Id.* at 553. Foreseeability alone does not impose a duty on the defendant, but it is a threshold question for duty. *Id.* See also *id.* at 556-557.[6]

This issue is distinct from, but closely related to, the issue of foreseeability that may expose an employer to vicarious liability. See *Mueller*, 323 Mich App at 574-576. The crux of negligent hiring, training, and retention is that "the employer bears some responsibility for bringing an employee into contract with a member of the public despite knowledge that doing so was likely to end poorly." *Id.* at 574, citing *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412-413; 189 NW2d 286 (1971). We previously distilled requirements to find an employer directly liable for tortious or criminal conduct of its employees:

> [A] claim of negligent hiring or retention requires actual or constructive knowledge by the employer that would make the specific wrongful conduct perpetrated by an employee predictable. See *Brown v Brown*, 478 Mich 545, 553-556; 739 NW2d 313 (2007). In particular, employers are not expected to anticipate that their employees will engage in criminal conduct without some particularized forewarning thereof. *Id*. at 555-556; *Hamed v Wayne Co*, 490 Mich 1, 12-15; 803 NW2d 237 (2011). Thus, lewd and crude commentary is not enough to put an employer on notice that an employee will commit a rape, although an actual threat to commit a rape would. *Brown*, 478 Mich at 555-556. A past history of generally aggressive and irresponsible behavior is not enough to put an employer on notice that the employee would engage in a violent sexual assault. *Hamed*, 490 Mich at 16. Knowledge of an employee having actually committed another rape would justify anticipating that the employee would reoffend if the employer had good reason to know of the prior crime. *Bradley v Stevens*, 329 Mich 556; 46 NW2d 382 (1951). However, employers are not strictly liable for their employees' misconduct that goes beyond what would generate vicarious liability under respondeat superior. *Zsigo v Hurley Med Ctr*, 475 Mich 215, 226-227; 716 NW2d 220 (2006). [*Mueller*, 323 Mich App at 575.]

[6] There are also other considerations to determine whether a duty existed. See *Buczkowski v McKay*, 441 Mich 96, 101; 490 NW2d 330 (1992) (holding gun store owner did not owe a duty to member of the general public harmed by intoxicated customer who purchased shotgun ammunition). For example, courts will often consider the relationship between the parties. See *Samson v Saginaw Prof Bldg, Inc*, 393 Mich 393, 406; 224 NW2d 843 (considering the relationship between a defendant landlord and plaintiff who was the employee of a building tenant, where plaintiff sued landlord for personal injuries she sustained when attacked by a mental patient undergoing treatment in a mental clinic leasing space in the landlord's building). These other considerations, however, are not at issue in this case. Both sides appear to focus their arguments on foreseeability.

Put another way, it is difficult to establish an employee should have foreseen potentially criminal conduct: offensive talk is not enough, a prior crime might be enough, but an actual threat is enough. See *id*.

Here, we have a threat. And that threat exposes Lagarda to liability for negligent retention and training. The fact that Gates had not previously shot or killed someone is not dispositive. See *id.*; *Hersch*, 385 Mich at 415-416. Plaintiff presented evidence that one of Lagarda's employees started carrying a gun at work, in violation of Lagarda's policies, including the intake documents that employee signed, and in violation of the policies of the DHC site where that employee worked. They also presented evidence that the employee told two supervisors, one of whom was responsible for his training, that he was carrying a gun at work. It is undisputed that that same employee used that gun to kill someone during one of his shifts. If a jury believes Gates's testimony, then Lagarda should have reasonably anticipated some harm would result. By way of analogy, if a court employee, or school employee, or any other worker who works at a site where guns are prohibited, started carrying a gun at work, it would be reasonable to expect some harm would result. And if that worker told a supervisor they were wrongfully carrying a gun, the employer would be liable. This is what happened here.

The trial court did not err in denying Lagarda's motion for summary disposition on plaintiff's claim of negligent training, retention, and supervision of Gates. It stated the correct standard and correctly identified the crucial facts at issue and evidence that complicated those facts. Specifically, it itemized evidence that three weeks prior to the shooting Gates obtained a firearm. Prior to the shooting Gates told two supervisors, Stringer and Hodges, that he was carrying a gun on the job for his personal protection, and the supervisors told him to keep the gun concealed. These facts combined with the fact that he received no training during orientation, no on-the-job training, and "little if any supervision on the job," satisfied a prima facie case for negligent training, retention, and supervision. In short, the trial court correctly centered its inquiry on Gates's conduct of wrongfully carrying a firearm in determining whether it was foreseeable that he would use that firearm to kill someone without adequate training, adequate supervision, or termination. The trial court did not err in denying the motion on that basis.

We observe however that the trial court's analysis focused on negligent training and retention, but is conspicuously silent on negligent hiring. This is because plaintiff relies on different and substantially weaker evidence for negligent hiring, namely alleged social media posts. Unlike Lagarda's duty to respond to information that Gates was wrongfully carrying a gun at work, plaintiff points to no authority requiring Lagarda to check Gates's social media presence prior to his hiring or how the proffered posts go beyond the offensive talk at issue in *Brown*.[7]

[7] In support of their claim that Lagarda was negligent in its hiring of Gates, plaintiff relied on posts made by or about Gates on Facebook. In plaintiff's answer to Lagarda's motion for summary disposition, they produced copies of Facebook pages attributed to Gates, many of which contain references to guns and acts of violence. However, there is no evidence that Lagarda knew about the Facebook postings to show that Lagarda had actual knowledge of facts from which it could have foreseen that Gates would criminally assault a third party. See *Ahmed v Air France-KLM*,

V. GROSS NEGLIGENCE

Lagarda also argues that the trial court erred by denying summary disposition in its favor on plaintiff's claim for gross negligence. We again disagree.[8]

In Count III, plaintiff alleged that Gates's conduct as an agent, servant, or employee of Lagarda was so reckless as to demonstrate a substantial lack of concern for whether an injury resulted, amounting to gross negligence. The complaint did not allege any additional acts directly attributable to Lagarda in support of the gross-negligence claim. Likewise, in its motion for summary disposition, Lagarda argued that plaintiff could not prove negligence, and therefore, could not prove gross negligence. It further argued that there was no evidence that it acted recklessly or with a substantial lack of concern for whether an injury would result.

We disagree. Gross negligence requires conduct so reckless as to demonstrate a substantial lack of concern for whether an injury will result. *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003). Duty is not only an essential element of a negligence claim, but it also is required for a claim of gross negligence. *Smith v Jones*, 246 Mich App 270, 274; 632 NW2d 509 (2001). If the plaintiff fails to establish a duty, summary disposition of a claim of gross negligence is appropriate. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001). However, as with a claim for ordinary negligence, Lagarda's liability for gross negligence is dependent upon evidence showing that Gates's shooting of Harris was foreseeable. As stated above, it was.

Having made out a prima facie case for duty, we also conclude that plaintiff has sufficiently alleged and presented facts to support the claim that the negligence was reckless enough to demonstrate a lack of concern regarding potential injuries. Again, if Lagarda as an employer knew that its employee, Gates, was carrying a firearm in contravention of its own policies, agreements between Gates and Lagarda, and agreements between Lagarda and DHC, and did nothing, it strongly suggests reckless disregard for the safety of others. Although the trial court failed to address this issue in its opinion and order, we find no basis for reversal.

VI. DAMAGES

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165 F Supp 3d 1302, 1315-1316 n 18 (ND Ga, 2016) (the court noted that information associated with an employee's Facebook account could not support the plaintiff's allegations of negligent hiring, supervision, or retention when there was no evidence that the defendant was aware of the Facebook postings). Lagarda argues that it was not required to investigate Gates's social media presence before hiring him, and plaintiff has not provided authority suggesting that was required.

[8] Preliminarily, although plaintiff argues that this issue is not preserved because the trial court did not address it, "a litigant 'preserve[s] an issue for appellate review by raising it in the trial court.' " *Wells v State Farm Fire & Cas Co*, 509 Mich 855(2022) (citation omitted). Because Lagarda challenged plaintiff's gross-negligence claim in its motion for summary disposition, the issue is preserved despite the trial court's failure to address it.

Finally, in its motion for summary disposition, Lagarda argued that even if plaintiff could establish liability, the evidence did not support recovery of damages for loss of Harris's financial support and household services because Harris did not earn enough income to support any dependents. Relying on *Daher v Prime Healthcare Servs-Garden City, LLC*, 344 Mich App 522; 1 NW3d 405 (2022), we disagree.[9]

We recently rejected arguments similar to that which Lagarda raises here. See *id.* This action was brought under the wrongful-death act, MCL 600.2922, which allows the decedent's survivors to recover specified damages. In *Daher*, this Court recently explained:

> Pursuant to MCL 600.2921, "[a]ll actions and claims survive death." However, "[a]ctions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to [the wrongful-death statute, MCL 600.2922]." *Id.* Such claims may be brought by the personal representative of the decedent's estate to the same extent the decedent could have brought those claims if the decedent had survived. MCL 600.2922(1) and (2). The decedent's parents are within the class of persons entitled to damages under the wrongful-death statute. MCL 600.2922(3)(a). Pursuant to MCL 600.2922(6),
>
> > In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.
>
> Our Supreme Court has explained that "the wrongful-death act is essentially a 'filter' through which the underlying claim may proceed," noting that a wrongful-death action is not created upon the death of the decedent, but rather *survives* the death of the decedent. *Wesche v Mecosta Co Road Comm*, 480 Mich 75, 88-89; 746 NW2d 847 (2008). [Emphasis in original.]

We further explained that damages may be recovered under the wrongful-death act for a decedent's lost earnings and that those entitled to recover under the wrongful-death act need not prove loss of financial support as a result of the decedent's death. *Id.* at 527-531. In *Daher*, the personal representative of the estate of a dead child brought a wrongful-death action against medical providers alleging medical malpractice. *Id.* at 525. The medical providers moved for summary disposition on the grounds that the plaintiff's claims for lost future earnings were

[9] Lagarda raised this issue in its motion for summary disposition and its motion for reconsideration. Because it raised the issue before the trial court, the issue is preserved even though the trial court did not address it. *Wells*, 509 Mich at 855.

speculative, and the trial court granted the medical providers' motion. *Id.* at 525-526. We disagreed and reversed the grant of summary disposition. *Id.* at 527-537. In so holding, we also concluded that the personal representative in a wrongful-death action could recover damages for the child's lost future earnings to the same extent that the child could have recovered those damages had he survived. *Id.* at 530-531, citing *Denney v Kent Co Rd Comm*, 317 Mich App 727, 731-732; 896 NW2d 808 (2016). Noting the distinction between a claim for lost financial support under the wrongful-death statute and a claim for lost earnings, "the former being a claim brought by a person who depended upon the decedent, and the latter being a claim brought by the decedent on their own behalf," we concluded that a claim for lost wages is not dependent on the decedent having supported the plaintiff. See *Daher*, 344 Mich App at 528.

Similarly, here, the parties have argued about the extent to which Harris provided support to his descendants, but that does not determine the outcome. Plaintiff presented some evidence that Harris paid his sister for rent or occasionally provided other unspecified financial assistance. Lagarda argued that he was transient. But under *Daher*, damages recoverable for wrongful death can include a decedent's lost earnings, and those entitled to damages need not necessarily prove lost financial support to recover damages for the decedent's lost earnings. Accordingly, regardless of whether plaintiff can establish that Harris supported them, this was not a basis for dismissing any claim for damages premised on Harris's lost earnings. Lagarda has not shown that plaintiff is not permitted to recover damages for Harris's lost earnings on the basis that those earnings would not leave anything for Harris's financial support of Bradley or others. Accordingly, it was not entitled to summary disposition on this claim.

VII. CONCLUSION

For the reasons stated above, we affirm the trial court's denial of summary disposition.

/s/ Michael F. Gadola
/s/ Stephen L. Borrello
/s/ Noah P. Hood