

IN THE SUPREME COURT OF THE STATE OF OREGON

DAVID SCHMIDT,)
)
Plaintiff-Appellant,) Multnomah County Circuit Court
Respondent on Review,) Case No. 0204-03531
)
and) Court of Appeals No. A124850
)
NM,) Supreme Court No. S058676
)
Plaintiff Below,)
)
v.)
)
MT. ANGEL ABBEY, an Oregon Not for Profit)
Corporation,)
)
Defendant-Respondent,)
Petitioner on Review,)
)
and)
)
ARCHDIOCESE OF PORTLAND IN)
OREGON, an Oregon Corporation; and the)
ROMAN CATHOLIC ARCHDIOCESE OF)
PORTLAND IN OREGON dba Archdiocese of)
Portland in Oregon, and successors, a)
corporation sole; SWISS-AMERICAN)
CONGREGATION OF THE ORDO SANCTI)
BENEDICTI; and LOUIS CHARVET,)
)
Defendants Below.)

OREGON ASSOCIATION OF DEFENSE COUNSEL AMICUS CURIAE
BRIEF IN SUPPORT OF PETITION FOR REVIEW

On Petition to Review the Decision of the Court of Appeals
June 9, 2010

Opinion by Ortega, P.J., joined by Armstrong, J., and Sercombe, J.

Appeal from the Judgment of the Circuit Court for Multnomah County
Hon. John A. Wittmayer

Amicus Curiae OADC Intends to File a Brief on the Merits

August 19, 2010

(Continued on reverse)

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**AMICUS BRIEF OF OREGON ASSOCIATION OF DEFENSE COUNSEL
IN SUPPORT OF PETITION FOR REVIEW**

Introduction

Amicus Curiae Oregon Association of Defense Counsel (“OADC”) appears in support of the Petition for Review filed in this case by Defendant–Respondent–Petitioner on Review Mt. Angel Abbey. Specifically, OADC appears in order to demonstrate that review should be granted.

The Court of Appeals decision, *Schmidt v. Archdiocese of Portland in Oregon*, 235 Or App 516, 234 P3d 990 (2010) (petition for review pending) (hereinafter “*Schmidt II*”),¹ has wide-ranging impact, affecting potentially every Oregon employer. Unchecked, and contrary to this court’s decision in *G.L. v. Kaiser Foundation Hospitals*, 306 Or 54, 757 P2d 1347 (1988) (hereinafter “*G.L. v. Kaiser*”) the decision supports the conclusion that an employer is subject to vicarious liability for the intentional wrongful acts of its employees whenever any act within the scope of employment “results in” or “culminates” in an intentional wrongful act that causes injury to the plaintiff. *Schmidt II*, 235 Or App at 523. The decision creates significant liability exposure for Oregon employers based on nothing more than the employment relationship itself and the opportunity for

¹*Schmidt II* is a decision on remand from the Supreme Court, *Schmidt v. Archdiocese of Portland*, 347 Or 389, 223 P3d 339 (2009) (hereinafter *Schmidt I*).

intentional wrongful conduct by an employee that his or her employment may provide.

1. The Court of Appeals Decision is Erroneous

Although the Court of Appeals may not have intended the unbounded expansion of vicarious liability that may follow, the decision clearly departs from the general rule against holding employers vicariously liable for intentional torts of employees that are outside the course and scope of employment. The decision also rejects this court's long-standing rule that something more than merely providing an opportunity to commit assaults by bringing the perpetrator and the plaintiff together in time and space is required in order to subject the employer to vicarious liability. *See G. L. v. Kaiser* 306 Or 54, 60-61; *Fearing v. Bucher*, 328 Or 367, 376-77, 977 P2d 1163 (1999). Until now, this court has taken care to maintain the rule of *G. L. v. Kaiser* by distinguishing "opportunity" from circumstances that involve "grooming" over time, *see Fearing v. Bucher*, 328 Or at 376-77, and manipulating positions of trust over time to commit sexual assaults, *Lourim v. Swensen*, 328 Or 380, 383-85, 977 P2d 1157 (1999). Despite that care and the limited circumstances that this court has recognized to support the imposition of vicarious liability for employees' intentional torts, the Court of Appeals has made a significant and, absent review, potentially lasting departure from the general rule and those limited exceptions. Contrary to *G.L. v. Kaiser*, the

Court of Appeals holds that acts within the scope of employment that “resulted in the acts that caused plaintiff’s injury” or “culminate in abuse” will support the imposition of liability. *Schmidt II* at 523.

2. The Court of Appeals Decision Conflicts with *G.L. v. Kaiser*

The Court of Appeals decision is not only in error, it is in conflict with *G.L. v. Kaiser*. Using the health care setting at issue in *G.L. v. Kaiser* as just one example, the departure from the *G.L. v. Kaiser* rule and the potential reach of the Court of Appeals decision in *Schmidt II* are astonishingly apparent. The decisions are irreconcilable.

Oregon hospitals, for example, employ thousands of individuals, in many professional health care fields. Over the course of a hospital stay a patient may encounter dozens of employed individuals, all of whom have a valid, employment-related reason for interacting with the patient or being in the patient’s room, whether to take x-rays, check vital signs, draw blood, change sheets, hang an IV drip, or simply repair or monitor equipment at the patient’s bedside. Any or all of those individuals may have reason to converse with the patient, if only to put them at ease for their legitimate presence in the room.

If any one of those individuals assaults a patient with no motivation whatsoever to serve any purpose of the employer, while, for example, at the same time repairing a monitor, or on a later visit to the patient’s room, the hospital’s

liability would depend on whether *G.L. v. Kaiser* controls or the Court of Appeals decision in *Schmidt II* controls. Under *G.L. v. Kaiser*, decided over 20 years ago, the hospital would not be vicariously liable. 306 Or at 60-61. Following the Court of Appeals decision in *Schmidt II*, on the other hand, the employee's monitor repair could be considered within the scope of employment, and, unless this court corrects or clarifies that decision, the employer is at risk that a trial court would erroneously consider the monitor repair to have "resulted in the acts that caused the plaintiff's injury," or "culminated in abuse." *Schmidt II*, at 523.

Review should be granted to resolve or reconcile this conflict.

3. The Decision has Broad Impact

The hospital setting is but one scenario. The reach of the Court of Appeals erroneous decision is far broader. Although applicable across all industries, its impact will be felt particularly acutely in any context involving a "relationship of trust," to include schools, boys and girls clubs, community athletic organizations, non-profit organizations devoted to children or impaired persons, police officers, assisted living facilities, counselors, drug and alcohol counselors, health care providers of every sort, and others. The potential impact is at the same time widespread and financially devastating to organizations and businesses alike who now face an expansion of liability for intentional acts because the perpetrator engaged in employment conduct that "resulted in" or "culminated in" a tortious act that

caused injury to the plaintiff, although that act was plainly not within the scope of employment.

4. The Issue of Employer Liability for the Acts of Employees Arises Frequently

The issue of employer vicarious liability arises frequently, in a wide variety of contexts. Yet this court has addressed the issue only infrequently over the years. In 1988, the court decided both *G.L. v. Kaiser* and *Chesterman v. Barmon*, 305 Or 439, 753 P2d 404 (1988). In 1999, the court decided *Fearing v. Bucher* and *Lourim v. Swensen*. Another eleven years have passed, and the courts below and litigants alike are in need of guidance. The appellate decisions are diverging, and the stakes are high. Compare *G.L. v. Kaiser* and *Vinsonhaler v. Quantum Residential Corp*, 189 Or App 1, 6-7, 73 P3d 930 (2003) (“* * * opportunity to engage in tortious conduct, however, is insufficient to establish the requisite nexus with employment as a matter of law”) (citing *Fearing*, 328 Or at 376) with *Schmidt II*.

Conclusion

The court should grant the petition for review filed by Respondent-Petitioner-on-Review Mt. Angel Abbey. In the event the court grants review, OADC seeks leave of court to file an amicus curiae brief in support of the merits brief of petitioner.

DATED this 18th day of August 2010.

KEATING JONES HUGHES, P.C.

/s/ Lindsey H. Hughes

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the date below I served the foregoing OREGON ASSOCIATION OF DEFENSE COUNSEL AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REVIEW on the following attorneys:

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by delivering via first class mail two true and correct copies to their last known addresses, placed in a sealed envelope and deposited in the U.S. Postal Service at Portland, Oregon.

On the same date and in the same manner, I filed the foregoing OREGON
ASSOCIATION OF DEFENSE COUNSEL AMICUS CURIAE BRIEF IN SUPPORT OF
PETITION FOR REVIEW by delivering the original and 12 copies to:

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Appellate Records Section
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DATED this 18th day of August 2010.

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