

## **SECOND PRACTICE PROBLEM**

On February 15, 2002, while relaxing in a Sherman Resort hot tub, Tabitha Green's hair became entrapped in the hot tub's drain. As a result, she was pulled under water and became unconscious. She was rescued by Joseph Sims, a Sherman Resort desk clerk who happened to be passing by the hot tub and saw what had happened. Sims was able to shut off the hot tub, disentangle Green and pull her from the hot tub. As a result of nearly drowning, Green suffered brain damage, including memory loss.

The statute of limitations for negligence and intentional tort claims in this jurisdiction is two years from the date of injury. On February 5, 2004, Green's lawyer, Abby Adams, sued Sherman Resorts alleging that its maintenance staff negligently failed to check the hot tub to make sure that the drain cover was securely in place.

The case progressed with each side doing a lot of discovery and taking numerous depositions. Defendant produced over 4,500 documents in response to plaintiff's numerous document requests. Amongst the documents was an incident report written February 22, 2002, a week after the incident. This report, along with about 800 other documents, was produced in early October, 2005.

The Feb. 22 incident report had a section written by Sims, the employee who had rescued Green. Sims relayed what he had seen and done in relation to Green's entrapment. It also contained a paragraph which stated that after Sims pulled Green out of the hot tub, he left the pool area to call 911. When he returned, Sims found James Jenks, a Sherman Resorts maintenance man, had removed Ms. Green's bathing suit and was fondling her. The incident report also had a paragraph from the hotel's human resource manager. That paragraph noted that Jenks was immediately fired and it noted that the human resources manager found a criminal history check with multiple entries for prior convictions for sexual assaults and batteries in Jenks' personnel file. The human resources director stated that the criminal history check must have come in after Jenks had already been hired and processed through her department.

Sims was deposed on November 15, 2005, about a month after the final round of documents were produced. Sims' deposition occurred shortly before he was transferred to a management position at a Sherman hotel in Kuwait. At the time Sims was deposed, Adams had not gone through the documents defendant had produced because she had just finished handling a complicated pro bono death penalty case. However, because of the Rule 26(a) disclosures, she did know that Jenks was the maintenance man in charge of the pool and hot tub the day Green was injured. Jenks could not be located and was never deposed.

Discovery was closed on March 31, 2006. Trial is scheduled for July 15, 2006. On April 12, 2006 as she was preparing for trial, Green's lawyer discovered the incident report. She immediately called Sherman's lawyer and told him she intended to amend the complaint and add a respondeat superior assault and battery claim and a negligent hiring and retention claim based on Jenks' misconduct. Sherman's lawyer refused to consent to the amendment, both because the claims would obviously negatively impact his client and because he knew that Adams was overwhelmed by all the paperwork and desperately wanted an excuse to get a continuance of the

trial. Adams filed a motion to amend on April 15, 2006 seeking to add a respondeat superior claim for assault and battery and a negligent hiring claim. The claims include a request for punitive damages as well as compensatory damages.

In this jurisdiction, it is clear that an employer may be liable for negligent hiring and retention (this claim essentially alleges that the hotel owed a duty to patrons to protect them against potentially dangerous employees, it breached this duty and the breach was a cause of the plaintiff's being sexually molested). However, there is a split in jurisdictions as to whether an employer may be liable under respondeat superior for the criminal acts of its employees. The jurisdiction in which this suit has been filed has not yet addressed that issue.

### **Should the judge allow plaintiff's motion to amend?**

**Reflective exercise to be completed after doing a draft answer.**

**Where did you look to identify all the applicable subparts of the rule?**

**In the last exercise you may have identified what you would do differently to identify and lay out subparts of the applicable rule. Did you do that in this exercise? Did it help you organize your answer? If not, how would you do it differently next time?**

**As you wrote out the answer, were there any places in which you were not sure what the law meant or how to apply it? If so, what did you do to clarify your understanding of the legal rule or its subpart?**

**USING THE FACTS: Underline the facts you did not use. In re-reading your answer, can you think of some place you might use those facts?**

**Are there some facts you could be using more than once? If you only used each fact once, look over your answer again and decide if there is any place your argument could be strengthened by using more facts (even if you already used that fact in a different place).**

**Looking over your draft answer, identify each place you made a conclusory argument (i.e. didn't use facts to support your argument). Re-write that sentence or paragraph so that you argue using the facts.**

**If, in the earlier exercise, you noticed that you were making conclusory arguments and came up with a plan to avoid making those arguments this time, did you use your plan? Was it effective? How would you improve upon that plan?**

**ARGUING BOTH SIDES: Looking over your draft answer, identify each place you did not argue for both sides. Can you now think of any argument you could make that you did not make? How will you make sure you argue both sides in the future (or at least note that you thought about an argument and discarded it)**

