[Cite as *Tucker v. Barrett,* 2011-Ohio-2854.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

LISA TUCKER, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2010-09-090
	:	O P I N I O N
- vs -		6/13/2011
	:	
CAMERON BARRETT,	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CV74353

Brett Goodson, Stephanie Day, 110 East Eighth Street, Suite 200, Cincinnati, Ohio 45202-2132, for plaintiffs-appellants

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HENDRICKSON, P.J.

{¶1} Plaintiff-appellant, Lisa Tucker, appeals the decision of the Warren County Court of Common Pleas granting summary judgment on behalf of defendant-appellee,

Sheram Enterprises, Inc. d/b/a Guardian Interlock ("Sheram"). We affirm the trial court's decision.

{¶2} The relevant facts of the case are as follows. Sheram is in the business of manufacturing and installing tamper-proof devices on automobiles that do not permit the car to drive if the driver has consumed alcohol. Sheram has one office in Sharonville, Ohio, where it employed Cameron Barrett as the facility's regional manager from 2006 to 2008. As regional manager, Barrett's typical duties included overseeing the growth and decline of 60 service centers, opening new service centers, ensuring technicians sent proper information regarding driving violations, and reviewing any discrepancies in the data received.

{¶3} However, on April 3, 2008, Barrett brought an AR-15 rifle to work. On that day, Barrett expected long periods of "down time" while waiting for the service centers to send sales data he needed to prepare a monthly sales report. During this "down time," Barrett planned to install several accessories on his rifle in his office.

{¶4} Throughout the course of the day, Barrett testified he disassembled the rifle to install the new accessories. After closing time, at approximately 5:00 p.m., Barrett was working on his rifle when he received a call on his cellular phone. Barrett testified he placed his rifle and a "magazine" containing bullets on a countertop in the service bay area while he took the call in his office several feet away. As Barrett spoke on the phone, he saw a service technician pick up the rifle, examine it, insert the magazine into the gun and remove it again.

{¶5} After finishing his phone call, Barrett returned to the service bay area, picked up the rifle, intending to test it by firing a "dry round" without bullets. In doing so, "Barrett pulled the trigger, and to his surprise, the rifle fired a bullet." To Barrett's surprise, the rifle fired a bullet across a nearby road. Moments later, Barrett discovered

the bullet penetrated Lisa Tucker's vehicle, hitting Tucker's daughter in the leg, and sending shrapnel into Tucker's chin and neck area.

{¶6} As a result of the incident, Tucker filed a complaint against Barrett, as well as Sheram, arguing Sheram was liable for Barrett's conduct under the doctrine of respondeat superior. Soon after, Sheram moved for summary judgment, claiming it was not liable for Barrett's conduct because Barrett was not acting within the course or scope of his employment when the incident occurred.

{¶7} On September 3, 2010, the trial court granted Sheram's motion for summary judgment, finding Barrett's conduct in handling the rifle was not actuated by a purpose to serve Sheram, nor was it the type of conduct Barrett was employed to perform.

{¶8} Tucker timely appeals, raising one assignment of error for review:

{¶9} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS IN RENDERING SUMMARY JUDGMENT IN FAVOR OF APPELLEE, SHERAM, DESPITE THE MANY GENUINE ISSUES OF MATERIAL FACT IN DISPUTE."

{¶10} In the case at bar, Tucker argues the trial court erred in granting summary judgment because genuine issues of material fact remained as to whether Barrett acted within the scope of his employment at the time of the accident. We find this argument without merit.

{¶11} This court's review of a trial court's ruling on a summary judgment motion is de novo. See *N. Am. Herb & Spice Co.*, *Ltd.*, *L.L.C. v. Appleton*, Butler App. No. CA2010-02-034, 2010-Ohio-4406, ¶14. Civ.R. 56 sets forth the summary judgment standard and requires that there be no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion being adverse to the nonmoving party. Id.; *Byrd v. Smith*,

Clermont App. No. CA2007-08-093, 2008-Ohio-3597, ¶30. The moving party has the burden of demonstrating that there is no genuine issue of material fact. Id. A material fact is one that would affect the outcome of the suit under the applicable substantive law. *Appleton* at ¶15.

{¶12} Once the moving party supports its motion with appropriate evidentiary materials, the nonmoving party must then present evidence showing that there is some issue of material fact yet remaining for the trial court to resolve. Id. at ¶16. The nonmoving party may not rely on mere allegations or denials in its pleading, but must respond with specificity to show a genuine issue of material fact. Id.; Civ.R. 56(E). All evidence submitted with a motion for summary judgment must be construed most strongly in favor of the nonmoving party. *Smith*, 2008-Ohio-3597 at ¶31.

{¶13} In the case at bar, while Tucker concedes the AR-15 rifle was not part of Barrett's "work duties," she argues she presented evidence showing a genuine issue of material fact regarding whether Barrett's handling of the rifle was "such a deviation [from his work duties] that it took him outside the course and scope of employment[.]"

{¶14} According to basic agency principles, 'scope of employment' as a legal term lacks a comprehensive definition because the cases are fact specific and presents a sui generis issue for review. *Smith* at ¶33, citing *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271. In an attempt to characterize scope of employment, the Ohio Supreme Court has stated that an employee's conduct is considered to be within the course of his employment when it "can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of the service to be rendered or a natural, direct, and logical result of it." *Posin* at 278.

{¶15} More specifically, Restatement of the Law 2d, Agency (1957), Section 228 sets forth three factors to consider when determining if an employee's conduct falls

within the scope of his employment. Only when: (1) the conduct is the kind the employee is employed to perform; (2) occurs substantially within authorized time and space limits; and (3) is actuated, at least partly, to serve the employer, will the employee's conduct be considered within the scope of his employment. *Posin* at 278. Additionally, an employee who departs from his employment to engage in his own affairs is no longer within the scope of his employment when that departure is "such a divergence from his regular duties that its very character severs the relationship of master and servant." Id.

{¶16} Because determining this issue is so fact specific and contingent in nature, whether an employee's conduct falls within the scope of his employment is generally a question of fact and is left within the province of a jury. *Smith*, 2008-Ohio-3597 at ¶35. However, summary judgment is appropriate in cases where reasonable minds can come to but one conclusion and the issue can be determined as a matter of law. Id. The issue becomes a matter of law when the material facts are undisputed and no conflicting inferences are possible. Id.

{¶17} After thoroughly reviewing the record, we find the trial court did not err in granting summary judgment to Sheram. The issue became a matter of law because reasonable minds could only have concluded that Barrett was not acting within the scope of his employment when he accidentally discharged his rifle and hit Tucker and her daughter. Even when construing the facts in Tucker's favor as the nonmoving party, the material facts are undisputed and no conflicting inferences are possible.

{¶18} First, at the time of the accident, we find Barrett was not engaged in conduct he was hired to perform. Despite Tucker's argument that Barrett was answering work-related phone calls and waiting on information for his reports at the time of the accident, the evidence clearly establishes Barrett was neither required to nor in the

practice of bringing semi-automatic rifles to work and assembling, disassembling, or firing them as part of his vocational duties. Instead, Barrett testified the rifle was strictly an "after-hours hobby" and agreed that the rifle was "not an accessory *in any way*" to his job for Sheram. (Emphasis added.)

{¶19} Second, we find Barrett's conduct was not actuated by a purpose to serve Sheram. Though Tucker argues Barrett's "very existence and availability to take phone calls and answer questions benefitted the business purpose of [Sheram]," this argument is unpersuasive, and Tucker cites no case law to support this claim. Instead, Barrett's own testimony reveals his purpose in bringing the rifle to work was in no way actuated to serve Sheram. Specifically, Barrett testified as follows:

{¶20} "[SHERAM'S ATTORNEY]: Would you agree with me that there was nothing about you owning an AR-15 that was beneficial to Mr. Sherman or [Sheram]?

{¶21} "[BARRETT]: I would agree.

{¶22} "[SHERAM'S ATTORNEY]: By the same token, there was nothing about bringing [the rifle] to work that was intended to be beneficial to [Sheram]?

{¶23} "[BARRETT]: No.

{¶24} "[SHERAM'S ATTORNEY]: The goal of your employment activities was to sell the [Sheram] systems and collect * * * monthly fees for the * * * system?

{¶25} "[BARRETT]: Essentially, yes."

{¶26} In such a case, we find Barrett's rifle was an instrumentality entirely unrelated to Sheram's business of manufacturing and installing breathalyzers. In fact, it is apparent that the rifle's presence on Sheram's premises constituted a "risk or peril not contemplated by [Barrett's] contract of service[.]" *Highway Oil Co. v. Bricker* (1935), 130 Ohio St. 175, 179.

{¶27} Lastly, we reject Tucker's argument that even if Barrett's conduct deviated

from the strict course of his duties, it was not such a divergence as to relieve Sheram from liability. We concede that "not every deviation from the strict course of duty is a departure such as will relieve a master of liability for the acts of a servant." *Oye v. Ohio State Univ.*, Franklin App. No. 02AP-1362, 2003-Ohio-5944, ¶6, quoting *Posin*, 45 Ohio St.2d at 278. In order to "sever the servant from the scope of his employment, the act complained of must be such a divergence from his regular duties that its very character severs the relationship of master and servant." Id.

{¶28} Subsequent to the *Posin* decision, the Ohio Supreme Court noted "an employer is not liable for independent self-serving acts of his employees which in no way facilitate or promote his business." *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 59. Tucker cites *Longhead Co. v. Hollenkamp* (App.1924), 3 Ohio Law Abs. 558, and *Amstutz v. Prudential Ins. Co. of Am.* (1940), 136 Ohio St. 404, to support her argument that in general, a jury must decide whether an employee's acts constituted such a departure from his strict duties as to relieve the employer of liability. However, as previously discussed, this issue may become a question of law when the material facts are undisputed and no conflicting inferences are possible. See *Smith*, 2008-Ohio-3597 at ¶35.

{¶29} In the case at bar, we find the material facts are undisputed where there is no evidence that Barrett's assembly and use of the rifle facilitated or promoted Sheram's business in any way. Instead, Barrett was engaged in his "after-hours hobby" – a wholly self-serving act, independent of any duty Barrett owed to Sheram as regional manager. This is particularly clear in light of Barrett's testimony that the rifle "never should have been [at work]," and that the rifle was "not necessary for any of the work duties that [Barrett was] doing that evening[.]" Moreover, if any doubt remained as to the magnitude of the divergence, Barrett made a clear distinction between working on his

rifle and working for Sheram:

{¶30} "[BARRETT]: When this incident occurred, I had a personal cell phone and a work cell phone, and I was very careful to differentiate the two. And what went on at work was generally work. * * * *This is the one exception* that makes me look ten times worse than I ever was as an employee. This kind of behavior is not routine practice. * * * when I was at work, I worked." (Emphasis added.)

{¶31} In such a case, where Barrett's conduct was admittedly "personal" and self-serving, we find this activity constituted such a departure from Barrett's strict duties as to relieve Sheram of liability. Accordingly, the trial court did not err in granting summary judgment on behalf of Sheram.

{¶32} Tucker's sole assignment is overruled.

{¶33} Judgment affirmed.

PIPER and HUTZEL, JJ., concur.