[Cite as *Grubb v. Sec. Natl. Bank & Trust Co.*, 2007-Ohio-1034.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

CINDY L. GRUBB, et al.

Plaintiff-Appellants

v.

SECURITY NATIONAL BANK
AND TRUST COMPANY, et al.

Defendant-Appellees

Appellate Case No. 06-CA-30

Trial Court Case No. 98-CV-0569

(Civil Appeal from
Common Pleas Court)

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O P I N I O N

Rendered on the 9th day of March, 2007.

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TERRI L. PARMLEY, Atty. Reg. #0040653, PAUL D. MALINA CO., LPA, 6 West High Street, Suite 806, Springfield, Ohio 45502
Attorney for Plaintiff-Appellants

ROBERT A. WINEBERG, Atty. Reg. #0005589, GORMAN, VESKAUF, HENSON & WINEBERG, 4 West Main Street, Suite 723, Springfield, Ohio 45502
Attorney for Defendant-Appellee Security National Bank & Trust Company

JAMES W. SKOGSTROM, Atty. Reg. #0012000, 2 West Columbia Street, Suite 200, Springfield, Ohio 45502
Attorney for Defendant-Appellee John Cole and 3rd Party Plaintiff Michele Cole

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BROGAN, J.

{¶ 1} Cindy L. Grubb and Mildred L. Brown appeal from the trial court's entry of summary judgment in favor of appellee Security National Bank & Trust Company ("SNB")

on their respondeat superior and negligent hiring and retention claims against the bank.[1]

{¶ 2} The appellants advance two assignments of error on appeal. First, they contend the trial court erred in entering summary judgment on the respondeat superior claim. Second, they assert that the trial court erred in entering summary judgment on the negligent hiring and retention claim. The appellants argue that genuine issues of material fact should preclude the entry of summary judgment on either claim.

{¶ 3} The present appeal stems from an incident involving John Cole, an SNB branch manager, Cindy Grubb, and her mother, Mildred Brown. On August 18, 1997, Grubb and Brown entered the Medway branch office and spoke with Cole about a checking account dispute. While meeting with Grubb and Brown in his office, Cole was unable to resolve the issue to their satisfaction. At one point, Grubb suggested that Cole had falsified bank records to deceive her. Cole responded by raising his voice and telling Grubb and Brown to "get out." Brown refused to leave, however, so Cole arose from his desk, took her by the arm, and attempted to escort her out of the bank. As he did so, Grubb hit or shoved him, causing him to fall into his desk. Grubb and Brown then exited the office and went into the lobby with Cole following them. As the two women walked across the lobby, Cole kicked Grubb from behind, hitting her in the crotch or thigh area. Grubb turned toward Cole to retaliate, and they briefly exchanged punches. Whether any of the punches hit their mark is disputed. In any event, Grubb and Brown moved toward the door and left the building. SNB fired Cole shortly after the incident.

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[1]Cindy Grubb's husband, Jeff Grubb, also has appealed from the entry of summary judgment against him on a loss-of-consortium claim. This claim, which is derivative of Cindy Grubb's tort claims against Security National Bank, has not been separately briefed by the parties.

{¶ 4} On August 18, 1998, the appellants filed a complaint against Cole and SNB. The complaint alleged that Grubb had sustained injuries when Cole kicked and hit her. It also alleged that Brown had sustained injuries when Cole grabbed her arm to escort her out of the bank. The complaint alleged that SNB was responsible for Cole's actions on the basis of respondeat superior. It also alleged that the bank was liable for negligent hiring and retention of Cole.[2] On January 24, 2006, the trial court sustained a motion for summary judgment filed by SNB. In so doing, the trial court found no negligent hiring or retention liability, as a matter of law, because "SNB could not have foreseen Cole's actions[.]" With regard to the respondeat superior claims, the trial court reasoned as follows:

{¶ 5} "According to the record here, Cole's duties included providing customer service, representing SNB, and overseeing the Medway branch. Grubb had a checking account with SNB and met with Cole to discuss some issue with it. Thus, the meeting between Cole, Grubb, and Brown arose out of a customer service situation at the Medway branch in which Cole was acting as SNB's representative. Nothing in the record suggests that this meeting involved anything other than SNB business for which Cole was employed to handle. Therefore, the initial encounter between Cole and the Plaintiffs took place within the scope of Cole's employment.

{¶ 6} "However, the record does not support a determination that the physical aspects of the encounter were reasonably connected to any bank business. Rather, Cole and the Plaintiffs had turned the situation personal by yelling at each other and striking one

[2]The complaint also alleged negligent training, but the assignment of error on appeal addresses only negligent hiring and retention.

another. These actions mark a clear departure from the scope of Cole's employment. By yelling at the Plaintiffs to get out of his office and running after and kicking Grubb, reasonable minds can only conclude that Cole was acting to 'vent his own malevolence' against Grubb and Brown. Consequently, SNB cannot be held responsible for Cole's self-serving act."

{¶ 7} The trial court entered final judgment for SNB on February 23, 2006, with Civ.R. 54(B) certification that there "is no just reason for delay." This timely appeal followed.

{¶ 8} In their first assignment of error, Grubb and Brown contend the trial court erred in entering summary judgment on their respondeat superior claim because reasonable minds could find that Cole was acting in the scope of his employment when he caused their alleged injuries. In support, they note the existence of evidence that Cole's responsibilities as branch manager included dealing with customer complaints and escorting customers off of the property, if necessary. As a result, the appellants argue that "even if Cole's actions were intentional, wrongful and not in compliance with company policy, handling customer complaints and escorting individuals from the bank were actions calculated to facilitate or promote bank business." In response, SNB contends Cole's responsibilities did not include physically removing customers from the bank. SNB also argues that Cole's acts of "physically accosting" Brown and chasing Grubb out of his office and kicking her from behind were clear departures from his responsibilities and did not in any way facilitate or promote bank business.

{¶ 9} Upon review, we find a genuine issue of material fact as to whether Cole's actions were within the scope of his employment and, therefore, whether SNB may be held

liable under respondeat superior. "It is well-established that in order for an employer to be liable under the doctrine of respondeat superior, the tort of the employee must be committed within the scope of employment. Moreover, where the tort is intentional, * * * the behavior giving rise to the tort must be 'calculated to facilitate or promote the business for which the servant was employed[.]'" *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 58, quoting *Little Miami RR. Co. v. Wetmore* (1869), 19 Ohio St. 110, 132. "'[A]n intentional and wilful attack committed by an agent or employee, to vent his own spleen or malevolence against the injured person, is a clear departure from his employment and his principal or employer is not responsible therefore.'" Id. at 59, quoting *Vrabel v. Acri* (1952), 156 Ohio St. 467, 474. "In other words, an employer is not liable for independent self-serving acts of his employees which in no way facilitate or promote his business." Id.

{¶ 10} "However, it is commonly recognized that whether an employee is acting within the scope of his employment is a question of fact to be decided by the jury." *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 330, citing *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 74 O.O.2d 427, 344 N.E.2d 334. "Only when reasonable minds can come to but one conclusion does the issue regarding scope of employment become a question of law." Id. "The willful and malicious character of an employee's act does not always, as a matter of law, remove the act from the scope of employment." Id., citing *Stranahan Bros. Catering Co. v. Coit* (1896), 55 Ohio St. 398, 410, and *Wiebold Studio, Inc. v. Old World Restorations, Inc.* (1985), 19 Ohio App.3d 246. "'When an employee diverts from the straight and narrow performance of his task, the diversion is not an abandonment of his responsibility and service to his employer unless his act is so divergent that its very character severs the relationship of employer and employee. * * * '" Id.,

quoting *Wiebold Studio*, 19 Ohio App.3d at 250.

{¶ 11} In *Byrd*, supra, the Ohio Supreme Court recognized the possibility that "an employer might be liable for an intentional tort if an employee injures a patron when removing her from the employer's business premises[.]" *Byrd*, 57 Ohio St.3d at 58. The *Byrd* court reasoned: "The removal of patrons, who may be unruly, underage, or otherwise ineligible to enter, is calculated to facilitate the peaceful and lawful operation of the business. Consequently, an employer might be liable for an injury inflicted by an employee in the course of removal of a patron." Id. at 59, citing *Stewart v. Napuche* (1952), 334 Mich. 76, and *Kent v. Bradley* (Tex. Civ. App. 1972), 480 S.W.2d 55. Likewise, in *O'Neal v. Schear's Metro Markets, Inc*. (June 13, 1997), Montgomery App. No. 16218, we found a genuine issue of material fact as to whether a store security guard acted within the scope of his employment when using force against an individual who refused to leave the business premises. In our decision, we noted that even if company policy did not authorize the security guard to use force, that fact would not be dispositive. "The relevant inquiry," we explained, "is not whether the use of force was authorized, or justified under the circumstances, but whether that force was used to facilitate or promote [the employer's] business." We then opined that reasonable minds could find the security guard's acts, "even if wrongful or intentional and not in compliance with company policy, were nevertheless calculated to facilitate or promote the business for which he was employed."

{¶ 12} We reach a similar conclusion here. The trial court correctly recognized that Cole's initial encounter with Grubb and Brown took place within the scope of his employment. They met in his office during work hours for the purpose of discussing an account dispute. We believe the trial court erred, however, in finding, as a matter of law,

that "the physical aspects of the encounter" were unrelated to bank business and were outside the scope of Cole's employment.

{¶ 13} According to SNB Vice President Thomas Locke, Cole was responsible for meeting with customers to discuss problems and complaints. (Locke depo. at 49-51). In his capacity as branch manager, Cole met with Grubb and Brown for that purpose. During the meeting, he reviewed bank statements with the two women and explained that a disputed check for $150 had not been charged to Grubb's account. In response, Grubb argued that the statements came from the bank's own computer and that Cole could "make them look any way" he desired. (Cole depo. at 80). At that point, Cole saw no point in continuing the discussion and told the women to "get out." (Id. at 80-81). When Brown refused to leave his office, Cole "got up and walked around the desk to take her by the arm and escort her out." (Id. at 82).

{¶ 14} In our view, a trier of fact reasonably could find that this contact, which allegedly injured Brown, occurred in the scope of Cole's employment as branch manager. In his deposition, Locke agreed that Cole's responsibilities included escorting someone off of the property, if necessary. (Locke depo. at 51). Given Brown's refusal to leave the office, Cole apparently determined that it was necessary to remove her. Regardless of whether his act of grabbing her arm was against company policy or justified under the circumstances, a trier of fact reasonably could find that it was related to bank business.

{¶ 15} We reach the same conclusion with regard to Cole's act of kicking, and possibly hitting, Grubb. His physical contact with Grubb came after she pushed or hit him in his office and as he followed the two women toward the exit. Construing the evidence in a light most favorable to the appellants, a trier of fact reasonably might find that Cole was in

the process of ejecting them from the premises when the contact occurred. Once again, even if his use of force was against company policy and entirely unjustified, reasonable minds could find that he was facilitating or promoting SNB's business by removing Grubb and Brown from the premises.

{¶ 16} In opposition to the foregoing conclusion, SNB argues that Cole was not a security guard and that he was not authorized to use force to remove a customer. SNB argues that he should have "made arrangements" for Grubb and Brown to leave the premises. If a security guard were not available, SNB asserts that Cole should have sought assistance from the police.

{¶ 17} In our view, the fact that Cole was not a security guard is not dispositive. Although *O'Neal*, supra, happened to involve a security guard, we are not persuaded that the removal of an uncooperative or disruptive customer facilitates or promotes an employer's business only when that act is performed by a security guard. To the contrary, we believe an office manager such as Cole also may facilitate or promote his employer's business by ordering a customer to leave and escorting the customer from the premises. We are equally unpersuaded by SNB's argument that Cole had no authority to use force and should have called the police. As in *O'Neal*, supra, the issue is not whether Cole exceeded his authority or acted properly. Rather, the issue is whether a trier of fact could find that his conduct was calculated to facilitate or promote his employer's business. Here reasonable minds could find that Cole was seeking to facilitate or promote the operation of the bank's business by expediting the removal of what he perceived as two disruptive and uncooperative customers from the premises. The fact that Cole may have exceeded his authority, and even acted tortiously, does not mean that he acted outside the scope of his

employment. Construing the evidence in a light most favorable to the appellants, we find a genuine issue of material fact on that question. Accordingly, we sustain the first assignment of error.

{¶ 18} In their second assignment of error, Grubb and Brown argue that the trial court erred in entering summary judgment against them on their negligent hiring and retention claim. In support, they contend a trier of fact reasonably could find that SNB should have foreseen Cole's actions. Conversely, SNB argues that it had no reason to suspect Cole would act as he did and that there is no triable issue of fact.

{¶ 19} Upon review, we find no error in the trial court's entry of summary judgment on the negligent hiring and retention claim. The elements of such a claim are: (1) the existence of an employment relationship, (2) the employee's incompetence, (3) the employer's knowledge of the employee's incompetence, (4) the employee's act or omission causing the plaintiff's injuries, and (5) a causal link between the employer's negligence in hiring or retaining and the plaintiff's injuries. *Harmon v. GZK, Inc.*, Montgomery App. No. 18672, 2002-Ohio-545.

{¶ 20} In the present case, Grubb and Brown argue that Cole had no prior banking experience, that SNB failed to conduct a meaningful reference or background check, and that SNB provided him with little training. Grubb and Brown also assert that Cole had been dismissed from two prior jobs and that SNB did not attempt to find out why before hiring him.

{¶ 21} In our view, none of the foregoing facts suggest that Cole had any propensity for engaging in tortious conduct or that SNB had actual or constructive knowledge of such propensity. The record reflects that Cole was recommended for his job by Alan Bobo, a

long-time SNB employee. Cole presented a resume that reflected prior work experience as a chief financial officer, tax manager, and accountant. He was interviewed twice, and SNB obtained a favorable credit report prior to hiring him. With regard to the absence of a reference or background check, Grubb and Brown cite nothing unfavorable that such a search would have uncovered, except for the fact that Cole previously had been dismissed from two jobs. The record reflects, however, that neither dismissal was for reasons bearing any similarity to the facts of this case. On one occasion, Cole was hired as a seasonal employee and was released when the busy season ended. On the other occasion, he was terminated as part of a reduction in force. Moreover, during his more than two years of employment with SNB, Cole's only displays of anger involved twice raising his voice with customers on the telephone. There is no evidence that SNB had knowledge of these incidents, which, in any event, did not reveal a propensity toward physical violence. In short, we find no evidence of any negligence by SNB in hiring or retaining Cole that could be construed as a proximate cause of the injuries to Grubb and Brown. Accordingly, we overrule the appellants' second assignment of error.

{¶ 22} The judgment of the Clark County Common Pleas Court is hereby affirmed in part and reversed in part, and the cause is remanded for further proceedings consistent with this opinion.

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FAIN and GRADY, JJ., concur.

Copies mailed to:

Terri L. Parmley
Robert A. Wineberg
James W. Skogstrom
Hon. Richard J. O’Neill