[Cite as *Greer v. Natl. City Corp.*, 2009-Ohio-5172.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

THOMAS D. GREER, et al.,	:	JUDGES:
	:	
	:	Hon. Shelia G. Farmer, P.J.
Plaintiffs-Appellants	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 08 CAE 12 0076
NATIONAL CITY CORPORATION, et al.	:	
	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas Case No. 07 CVC 07 0847
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 28, 2009

APPEARANCES:

For Plaintiffs-Appellants:

GERALD L. RODERICK, ESQ.
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Columbus, Ohio 43202

For Defendants-Appellees:

CURTIS F. GANTZ, ESQ.
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Two Miranova Place
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Delaney, J.

{¶1} Plaintiffs-Appellants, Thomas D. Greer and Martha N. Greer, appeal from the Delaware County Court of Common Pleas judgment entry granting summary judgment in favor of Defendants-Appellees National City Corporation ("NCC"), National City Bank ("NCB"), Nikki Johnston, Greg Mulach, and David Weiss.

STATEMENT OF FACTS AND THE CASE

{¶2} The facts giving rise to the underlying complaint in this case establish that on January 28, 2003, Appellants entered into a depository banking relationship with NCB. At the time that Appellants opened their accounts with NCB, they signed an agreement that NCB could close their accounts without cause and without prior notice to Appellants. Over the next two years, the Appellants experienced problems in the servicing of their accounts by NCB's Sandusky Street branch.

{¶3} Then on April 21, 2005, Appellant Martha Greer entered the Sandusky branch and asked for seven newly minted 'Reagan' coins and seven crisp, new one dollar bills for her grandson's seventh birthday. The bank teller provided Mrs. Greer with the bills from the stack and advised her that those were the newest bills that the branch had at that time. The teller also advised Mrs. Greer that the bank did not have the 'Reagan' coins but had the 'Sacagawea' dollar coins and provided those to her. Mrs. Greer did not request that somebody call other branches to see if they had either newer dollar bills or the 'Reagan' coins. Mrs. Greer described the exchange as a cordial transaction, although she was disappointed.

{¶4} Mrs. Greer returned to her vehicle and relayed the information to Mr. Greer, who said "I'll see what I can do" and immediately exited the car and entered the bank and asked again for crisp new bills and the newly minted coins.

{¶5} At this point, the evidence before this Court begins to diverge.

{¶6} Mr. Greer stated the bank teller made an attempt to locate a branch that might have the currency he was looking for but the response was that no other branch had the currency. Mr. Greer stated at no time was he disorderly, hostile or threatening to any individual. He claims he was treated harshly and unfriendly by the bank manager, Nikki Johnston, and was in the process of leaving the building when he "raised my voice in a slow and calm manner to announce that I had been ordered out of the bank, * * * and to please witness that I am leaving so not to risk being charged for trespassing". Thomas Greer Affidavit, ¶16.

{¶7} According to Ms. Johnston, Mr. Greer began acting in an unacceptable manner and was being disruptive in the bank. Ms. Johnston then instructed Mr. Greer to leave the bank. At that time, Ms. Johnston returned to her office and called NCB Security to report Mr. Greer's behavior and to request assistance in having him removed from the bank premises. Specifically, Ms. Johnston relayed to security that there was a disruptive customer in the bank, that NCB had problems with this customer in the past, particularly with female employees, that she had asked him to leave and that he refused to do so.

{¶8} Shortly after Mr. Greer left the premises, Officer Nelson of the Delaware Police Department arrived at the bank and spoke with Ms. Johnston. At this point, she was crying but was able to thereafter compose herself. When the officer asked Ms.

Johnston if she wanted to press criminal charges against Mr. Greer, she stated that she did not. Ms. Johnston averred she did not initiate contact with the Delaware Police Department nor did she ever file or cause to be filed any criminal charges.

{¶9} Subsequent to this confrontation, NCB decided to close Appellants' accounts with the bank. On May 10, 2005, Appellee Greg Mulach, the Senior Vice President of NCB, sent a letter to Appellants stating that NCB would close their accounts on May 31, 2005, if Appellants had not done so on their own by that date. In the letter to Appellants, Mr. Mulach reminded Appellants of the Personal Account Agreement and the Business Account agreement which allowed the bank to close the accounts with or without cause and without prior notice to Appellants.

{¶10} Mr. Greer wrote a letter to Mr. Mulach acknowledging the May 31, 2005, date of closing the accounts and agreed that the accounts should be closed. Pursuant to the letter sent to Appellants on May 10, 2005, their accounts were closed at approximately 4:00 p.m. on May 31, 2005, by Brent Voss, a licensed financial consultant with NCB, who received the instructions to close the Appellants' accounts on that day.

{¶11} Immediately after closing Appellants' accounts, NCB issued three official checks to Appellants for the balances in their three accounts and forwarded the checks to Appellants. It later became apparent that Appellants had continued to write checks on their accounts up through May 27, 2005, which resulted in 12 dishonored checks to various merchants.

{¶12} After discovering these 12 checks, NCB reopened Appellants' accounts to allow them to present the previously dishonored checks for payment. Appellants failed

to maintain the required minimum balances in their reopened accounts, however, and fees were assessed on those accounts pursuant to the Personal Account Agreement previously entered into by the parties. Eventually, all 12 checks were paid and NCB paid the fees associated with the checks.

{¶13} On April 21, 2006, Appellants filed a complaint in Delaware County Common Pleas Court, naming NCC, Nikki Johnston, and Greg Mulach as defendants. After discovery was conducted in the case, the defendants filed a motion for summary judgment. Appellants voluntarily dismissed their case on March 29, 2007.

{¶14} On July 18, 2007, Appellants filed a second complaint, naming NCC, NCB, Nikki Johnston, Greg Mulach, and David Weiss as defendants.

{¶15} In their complaint, Appellants allege four causes of action. The first cause of action asserts a defamation claim against NCC, NCB, and Ms. Johnston, stemming from statements Ms. Johnston allegedly made to police on April 21, 2005, regarding the interaction with Mr. Greer inside the Sandusky branch.

{¶16} In their second and third causes of actions, Appellants assert claims against NCC, NCB, Mr. Mulach and Mr. Weiss for breach of contract, wrongful dishonor, and breach of duty for failing to notify Appellants before closing their accounts.

{¶17} In their fourth cause of action, Appellants assert a claim against NCC and NCB for an alleged wrongful withholding of a portion of the balances in Appellants' accounts after the May 31, 2005, account closings.

{¶18} On October 10, 2008, Appellees NCB, Johnston, Mulach, and Weiss filed a motion for summary judgment, requesting that the trial court dismiss all claims except for the alleged wrongful withholding of the account balances. On that same date,

Appellee NCC separately filed a motion for summary judgment, requesting that the trial court dismiss all claims asserted against NCC. Also on the same date, Appellants filed a motion for partial summary judgment, requesting that the trial court establish liability as to all defendants on each of Appellants' claims.

{¶19} On December 2, 2008, the trial court issued a written decision granting NCC's motion for summary judgment, and dismissing all of Appellants' claims against it. In so doing, the court denied Appellants' motion for partial summary judgment on their claims against NCC.

{¶20} Additionally, the trial court granted NCB and Ms. Johnston's motion for summary judgment on Appellants' defamation claim, and denied Appellants' motion for partial summary judgment as it related to that claim.

{¶21} Moreover, the court granted NCB, Mr. Weiss and Mr. Mulach's motion for summary judgment on the breach of contract, breach of duty to notify of closing the accounts, and wrongful dishonor claims, and denied Appellants' motion for summary judgment on the same.

{¶22} Finally, the court denied Appellants' and NCB's summary judgment motions on the fourth claim for wrongful withholding. As to the fourth claim, however, the trial court determined that Appellants had failed to state a claim upon which the Court of Common Pleas had monetary jurisdiction, as the total amount alleged to be owed to Appellants from the bank was $369.36. The trial court further found that Appellants had no basis to claim punitive damages as it related to that claim. Accordingly, the court transferred jurisdiction to the Delaware County Municipal Court for trial.

{¶23} Appellants raises eleven Assignments of Error:

{¶24} "I. THE TRIAL COURT ERRED BY NOT APPLYING THE APPROPRIATE LEGAL STANDARD IN GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT.

{¶25} "II. THE TRIAL COURT ERRED IN FINDING THAT THE EVIDENCE IS UNCONTRADICTED THAT DEFENDANTS NATIONAL CITY BANK AND NATIONAL CITY CORPORATION ARE NOT THE SAME LEGAL ENTITY.

{¶26} "III. THE TRIAL COURT ERRED IN FINDING THAT APPELLANTS PRESENTED NO EVIDENCE TO MEET OR CONTRADICT DEFENDANTS' CONTENTION THAT APPELLANTS HAD NO RELATIONSHIP WITH DEFENDANT NATIONAL CITY CORPORATION.

{¶27} "IV. THE TRIAL COURT ERRED IN FINDING APPELLANTS' CLAIM FOR DEFAMATION AGAINST DEFENDANT NATIONAL CITY BANK IS TIME BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

{¶28} "V. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO EVIDENCE THAT THE DELAWARE CITY POLICE RELIED ON STATEMENTS BY DEFENDANT NIKKI JOHNSTON.

{¶29} "VI. THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO EVIDENCE OF DEFENDANT'S NIKKI JOHNSTON'S MALICE IN REPORTING THE EVENTS OF APRIL 21, 2005.

{¶30} "VII. THE TRIAL COURT ERRED IN FINDING THAT APPELLANTS HAVE NO CLAIM AGAINST INDIVIDUAL EMPLOYEES ACTING ON BEHALF OF NATIONAL CITY BANK BECAUSE THOSE EMPLOYEES ARE NOT 'PAYOR BANKS.'

{¶31} "VIII. THE TRIAL COURT ERRED IN FINDING THAT THE CORRESPONDENCE BETWEEN THE PARTIES DID NOT CREATE A NEW CONTRACT.

{¶32} "IX. THE TRIAL COURT ERRED IN FINDING THAT NO LEGAL DUTY EXISTS REQUIRING A BANK TO CONSULT WITH ITS CUSTOMER, PRIOR TO CLOSING THE CUSTOMER'S DEPOSITARY ACCOUNT, SO AS TO ASCERTAIN THE EXISTENCE OF OUTSTANDING CHECKS.

{¶33} "X. THE TRIAL COURT ERRED IN TRANSFERRING THE FOURTH CAUSE OF ACTION (FOR CONVERSION) TO THE DELAWARE MUNICIPAL COURT.

{¶34} "XI. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT."

{¶35} Appellants initially contend that the trial court applied the incorrect legal standard in granting Appellees' motions for summary judgment and claims that the trial court should have granted Appellants' partial motion for summary judgment.

{¶36} When reviewing the granting of a motion for summary judgment, an appellate court uses a de novo standard of review. *LaSalle Bank NA v. Tirado*, 5th Dist. No. 2009-CA-22, 2009-Ohio-2589, ¶14.

{¶37} Civil Rule 56(C) states in part:

{¶38} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

{¶39} Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously with any doubts resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 1992-Ohio-95, 604 N.E.2d 138.

{¶40} The party seeking summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence that demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 1997-Ohio-259, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.

{¶41} Given the fact this Court will conduct a de novo review of the summary judgment motions and all proper Civ. R. 56 evidence; we overrule the first assignment of error.

A. No Evidence to Demonstrate that NCB and NCC Are the Same Entity.

{¶42} In Appellants' second and third assignments of error, they argue that the trial court erred in determining that the evidence failed to support a finding that NCB and NCC are the same legal entity and that Appellants' had a legal relationship with NCC.

{¶43} "It is a general principle of corporate law deeply "ingrained in our economic and legal systems" that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its

subsidiaries. Douglas & Shanks, Insulation from Liability Through Subsidiary Corporations, 39 Yale L.J. 193 (1929) (hereinafter Douglas); see also, e.g., *Buechner v. Farbenfabriken Bayer Aktiengesellschaft*, 38 Del.Ch. 490, 494, 154 A.2d 684, 687 (1959); *Berkey v. Third Ave. R. Co.*, 244 N.Y. 84, 85, 155 N.E. 58 (1926) (Cardozo, J.); 1 W. Fletcher, Cyclopedia of Law of Private Corporations § 33, p. 568 (rev. ed. 1990) ("Neither does the mere fact that there exists a parent-subsidiary relationship between two corporations make the one liable for the torts of its affiliate"); Horton, Liability of Corporation for Torts of Subsidiary, 7 A.L.R.3d 1343, 1349 (1966) ("Ordinarily, a corporation which chooses to facilitate the operation of its business by employment of another corporation as a subsidiary will not be penalized by a judicial determination of liability for the legal obligations of the subsidiary"); cf. *Anderson v. Abbott*, 321 U.S. 349, 362, 64 S.Ct. 531, 537, 88 L.Ed. 793 (1944) ("Limited liability is the rule, not the exception"); *Burnet v. Clark*, 287 U.S. 410, 415, 53 S.Ct. 207, 208, 77 L.Ed. 397 (1932) ("A corporation and its stockholders are generally to be treated as separate entities")." *U.S. v. Bestfoods* (1998), 524 U.S. 51, 61, 118 S.Ct. 1876, 141 L.Ed.2d 43.

{¶44} The evidence provided by the parties in regards to this issue was succinctly summarized by the trial court as follows:

{¶45} "National City Corporation supported its motion with the following materials: (a) the Account Agreement that plaintiffs received from National City Bank when they opened accounts there; (b) two checks written by plaintiff Thomas Greer on those National City Bank accounts on May 27, 2005; (c) a letter from Greg Mulach as an officer of National City bank to the plaintiffs on May 10, 2005, advising them that National City Bank would close their accounts by May 31, 2005; (d) letters from Thomas

Greer to Greg Mulach at the National City Bank on April 23, 2005, and April 28, 2005, together with fax cover sheets for their transmittal; (e) National City Bank's response to Plaintiffs' First Set of Interrogatories which assert under oath that it is a "national banking association organized an [sic] existing by virtue of the laws of the United States of America"; (f) documents from the Delaware Secretary of State showing National City Corporation's incorporation there in 1972 and from the Ohio Secretary of State showing National City Corporation's license to do business in Ohio in 1973; (g) National City Corporations' Amended Answers to Plaintiffs' Interrogatories, which assert under oath that National City Corporation and National City Bank are separate legal entities and that the plaintiffs' transactions involved the National City Bank; (h) a document from the Ohio Secretary of State showing National City Bank's registration of the "National City Bank" trade name after August 13, 2002, with an explanatory letter from an attorney examiner for the Ohio Department of Commerce; (i) Plaintiff Thoms [sic] Greer's Responses to Defendants' First Set of Interrogatories; and (j) Defendants' Responses to Plaintiffs' Second Request for the Production of Documents.

{¶46} "In opposing that motion, the plaintiffs rely on the materials they submitted to support their own motion (listed below), plus (a) documents from the Ohio Secretary of State showing National City Bank's registration of the "National City Bank" trade name after August 13, 2002; (b) documents from the Ohio Secretary of State showing National City Corporation's license as a Delaware Corporation to do business in Ohio in 1973, and its earlier registration of the "National City Bank" trade name in 1992; (c) a document from the Delaware Secretary of State showing National City Corporation's incorporation there in 1973; (d) two letters from a National City Corporation officer to

David Greer relating a possible settlement of the current dispute; and (e) an undated telephone directory advertisement for National City Bank which shows an unexplained relationship with National City Corporation."

{¶47} The materials further included: "(a) two affidavits from Thomas Greer and one from Martha Greer; (b) a copy of the police report for the events on April 21, 2005; (c) the Personal Account Agreement that the plaintiffs received when they opened these accounts; (d) Mr. Mulach's letter to Mr. Greer on May 10, 2005; (e) Mr. Greer's letter to Mr. Mulach on April 23, 2005; (f) Mr. Weiss's email to other bank employees on May 30, 2005; (g) copies of twelve checks that plaintiffs wrote on these accounts: (h) a DHL waybill for delivery of a package from National City Bank to Mr. Greer [apparently on May 31, 2005]; (i) a letter from Mr. Weiss to Mr. Greer on May 31, 2005, which transmitted checks for finds from those accounts; (j) a "Receipt" from Oakland Nursery for payment of a reportedly dishonored check; (k) the plaintiffs list of claimed "Expenses Incurred in the National City Bank Matter;" (l) a letter report from Nikki Johnston on May 4, 2005, about the events on April 21, 2005; (m) a letter from Mr. Voss to Mr. Weiss on May 4, 2005, recounting his observation of the events on April 21, 2005; (n) National City Banks' forms and procedures for closing a personal checking account; and (o) extracts from the deposition of Thomas Greer."

{¶48} Upon a de novo review of the evidence before us, we also conclude there was simply no evidence presented that NCC was involved in the events leading up to the confrontation on April 21, 2005, or that NCC was involved in the closing of Appellants' accounts on May 31, 2005.

{¶49} Accordingly, Appellants' second and third assignments of error are therefore overruled.

B. Defamation Claim Against NCB Are Barred By Statute Of Limitations And No Evidence To Support Defamation Claim Against Nikki Johnston.

{¶50} In Appellants' fourth, fifth, and sixth assignments of error, they argue that the trial court erred in finding that the statute of limitations precluded them from filing a defamation action against NCB and that the trial court erred in granting summary judgment with respect to their defamation claim against NCB employee Nikki Johnston.

{¶51} An action for slander or libel must be brought within one year after the cause of action accrued. R.C. 2305.11(A). A cause of action for defamation accrues on the date of publication of the alleged defamatory matter. *Fleming v. Ohio Atty. Gen*, 10th Dist. No. 02AP-240, 2002-Ohio-7352.

{¶52} With respect to the statute of limitations claim, the parties agree that the relevant events with respect to the defamation claim occurred on April 21, 2005. Appellants did not name NCB as a defendant in the defamation action until they filed their second complaint on July 28, 2007. Though Appellants contend that the "savings clause" in R.C. 2305.19 extended the time for the refilling of the claim since they had filed their original complaint on April 21, 2006, which they voluntarily dismissed on March 29, 2007, we, like the trial court below, find this argument to be unpersuasive.

{¶53} The previous suit named NCC and Nikki Johnston as defendants, but did not name NCB as a defendant. The savings clause provides no support for Appellants' subsequent claim against a *new* party defendant. As we ruled in response to Appellants' second and third assignments of error, NCC and NCB are two separate

legal entities. The evidence before this Court, with respect to this argument, demonstrates NCC is a bank holding company corporation, incorporated under the laws of Delaware. NCB is a national bank, chartered by the Office of the Controller of Currency of the United States Treasury Department, which currently registers the trade name "National City Bank" with the Ohio Secretary of State. As also noted by the trial court, Appellants did not seek to amend a complaint that misnamed a defendant who knew or should have known it was the intended party defendant. See, Civ. R. 15(C). Rather, the Appellants dismissed their claims against allegedly responsible parties and now seek to assert a time barred claim against a new party.

{¶54} We overrule Appellants' fourth assignment of error.

{¶55} We turn now to Appellants' claim that Nikki Johnston maliciously reported the events of April 21, 2005, to authorities and that the authorities relied upon that information in filing a police report.

{¶56} Appellants assert that Ms. Johnston, as an employee of NCB, defamed Mr. Greer by reporting Mr. Greer's disruptive behavior to Officer Nelson who came to the scene.

{¶57} The underlying complaint alleges, in part:

{¶58} "23. Despite the fact that Plaintiffs did not act or behave illegally or inappropriately toward National City Bank's employees, Defendant Nikki Johnston contacted bank security, who then contacted the Delaware City Police Department, to complain about Plaintiff Thomas Greer.

{¶59} "24. An officer of the Delaware City Police Department responded to the call from bank security, and interviewed Defendant Nikki Johnston about the purpose of the call.

{¶60} "25. Defendant Nikki Johnston, acting with malice, and knowing that the information she was supplying to the Delaware City Police Department was false, participated in the filing of a false police report about Thomas Greer.

{¶61} "26. The aforementioned police report stated that Plaintiff Thomas Greer "is known to be a problem" and "frequently gets loud with all female employees", statements which were completely false and known to Defendant Nikki Johnston to be false."

{¶62} A defamatory statement is the unprivileged publication of false and defamatory matter that tends to reflect injuriously on a person's reputation, or exposes a person to "public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession. *A & B-Abell Elevator v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St.3d 1, 7, 651 N.E.2d 1293. When alleged defamatory statements have occurred in a business context by someone whose job gives that person a legitimate interest in the matter, they are subject to a qualified privilege when the circumstances exist or are reasonably believed by the defendant to exist.

{¶63} A publication is privileged when it is "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." *Hahn v. Kotten* (1975), 43 Ohio St.2d 237, 244, 331 N.E.2d 713.

{¶64} In *Hahn*, the Ohio Supreme Court stated:

{¶65} "A publication is conditionally or qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty, or whether the person is so situated that it becomes right in the interests of society that he should tell third persons certain facts, which he in good faith proceeds to do. This general idea has been otherwise expressed as follows: A communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation. The essential elements of a conditionally privileged communication may accordingly be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits." ' " (Emphasis omitted.) *Hahn*, supra, at 245-246.

{¶66} One type of interest protected by a qualified privilege is the public interest. The public interest privilege "involves communications made to those who may be expected to take official action of some kind for the protection of some interest of the public." *Hahn*, supra, quoting Prosser & Keeton, The Law of Torts, supra, at 830, Section 115. See, also, 3 Restatement of the Law 2d, Torts (1977) 281, Section 598.

{¶67} Section 598 of the Restatement of Torts 2d provides:

{¶68} "Communication to One Who May Act in the Public Interest

{¶69} "An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that

{¶70} "(a) there is information that affects a sufficiently important public interest, and

{¶71} "(b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true."

{¶72} Appellees assert that any statements made by Johnston to the bank's security personnel and to law enforcement were protected by qualified privilege.

{¶73} The evidence before us establishes that Ms. Johnston reported the events on April 21, 2005, to the bank's security department, and that the bank's security personnel reported the matter to the local police who then contacted both Ms. Johnston and Mr. Greer. The police report states:

{¶74} "NIKKI JOHNSTON CALLED NATL CITY SECURITY REF TOM GREER. TOM IS KNOWN TO BE A PROBLEM, HE FREQUENTLY GETS LOUD W ALL FEMALE EMPLOYEES BUT NOT W MALE. TOM CAM [SIC] IN WANTING A NEW COIN AND WAS TOLD THAT THEY DIDN'T HAVE THE COIN. TOM DEMANDED THEY CALL OTHER BRANCHES. HE WAS TOLD THEY WOULDN'T DO THAT, NONE OF THE BRANCHES HAVE THE COIN YET. HE WAS TOLD TO LEAVE, HE REFUSED. ONCE SECURITY WAS CALLED HE STARTED YELLING AT EVERYONE, HE LEFT WHEN HE REALIZED PD WAS COMING" [SIC].

{¶75} Ms. Johnston, in her affidavit, stated:

{¶76} "7. I did not initiate contact with the Delaware Police Department in reference to Mr. Greer. I never filed criminal charges against him.

{¶77} "8. I provided a limited statement to National City security regarding my observations of Mr. Greer and sought only to protect the safety of myself and the other bank employees.

{¶78} "9. I did not act out of any ill will or malice toward Mr. Greer and acted only in the interest of the safety of myself and the bank's employees."

{¶79} To defeat the privilege, it is incumbent upon a plaintiff to prove that the published statements were untrue and made with actual malice. Proof of actual malice requires clear and convincing evidence that the defendant, acting out of spite or ill will made the statements either with knowledge that they were false or with reckless disregard for their truth. *Jacobs v. Frank* (1991), 60 Ohio St.3d 111, 573 N.E.2d 609, paragraph two of the syllabus.

{¶80} Ms. Johnston's statements to the bank's security department and/or Officer Nelson were undisputedly subject to qualified immunity. In her capacity as branch manager, Ms. Johnston related to her employer her personal observations and concerns arising from the April, 2005 incident. Although Appellants dispute Ms. Johnston's version of events, it does not defeat Ms. Johnston's subjective belief that the safety of bank personnel was threatened by Appellant Thomas Greer's behavior. There is simply no evidence before this Court that Ms. Johnston or the bank security office lacked a good faith belief in the accuracy of their statements.

{¶81} Appellants' fifth and sixth assignments of error are hereby overruled.

C. No Valid Claim Against Individual Employees Acting On Behalf of NCB, No Modification Of Contract, and No Duty To Correspond With Customers Prior To Closing Account.

{¶82} In their seventh assignment of error, Appellants contend that the trial court erred in determining that no material issue of fact existed with respect to NCB employees Greg Mulach and David Weiss committing misconduct in their dealings with Appellants. In their brief, Appellants argue that Mr. Mulach and Mr. Weiss were negligent in their interactions with Appellants, that they committed misconduct, and that they breached their contract with Appellants.

{¶83} Moreover, in their eighth assignment of error, Appellants contend that the communications by Mr. Mulach and Mr. Weiss of sending a letter to Appellants on May 10, 2005, wherein they notified Appellants that they would be closing their bank accounts on May 31, 2005, pursuant to the Personal Account Agreement, actually modified the original contract and created a new contractual agreement. Appellants argue that the trial court erred in failing to accept their argument and in granting summary judgment on these grounds.

{¶84} Additionally, in their ninth assignment of error, Appellants claim that the trial court erred in granting summary judgment because a legal duty existed requiring the bank to consult with them prior to closing their accounts so as to ascertain the existence of any outstanding checks that Appellants may have written on their own accounts. Appellants, however, concede that there is no Ohio case law supporting this argument.

{¶85} The trial court found that Appellants failed to show a legally cognizable claim against the bank employees for account irregularities. "The Complaint and all the evidence show that the plaintiffs dealt with the defendant individuals as bank employees with full knowledge that those employees acted for and on behalf of the defendant bank. In that contractual setting, the plaintiffs have no claim against those employees for alleged mishandling of the plaintiffs' accounts. *Perrysburg Twp. V. Rossford*, 149 Ohio App.3d 645, 778 N.E.2d 619, 2002-Ohio-5498; *Stryker Farms Exchange v. Mytczynskyj* (1998), 129 Ohio App.3d 338, 717 N.E.2d 819; *Stuart v. National Indem. Co*. (1982), 7 Ohio App.3d 63, 454 N.E.2d 158. The plaintiffs cannot rely on the statutory remedy for wrongful dishonor of checks to recover damages from bank employees, because bank employees are not "payor banks" to which that section applies. See R.C. 1304.31."

{¶86} The trial court relied on the fact that the bank gave Appellants written notice by virtue of a letter sent to them on May 10, 2005, that it would close their accounts on May 31, 2005. Appellants conceded that they received this notice and in fact, even wrote a letter to NCB agreeing that the accounts should be closed by "the end of May".

{¶87} The Personal Account Agreement, which Appellants signed upon opening their accounts with NCB, provides:

{¶88} "Bank may close the Account or terminate electronic access to Account by means of a card or code with or without cause and without prior notice to Depositor."

{¶89} The trial court found, and we agree, that the bank had no duty to give any greater notice than it gave, or to hold any account open for payment of previously written checks. It is the duty of the account holder to know the status of their account.

Appellants knew that their account would be closed at some point on May 31, 2005, yet chose to write checks on that account as late as May 27, 2005. The burden is not on the bank to determine if an account holder has outstanding checks on the date of the closing of the account.

{¶90} Moreover, the letters sent to Appellants notifying them that their accounts would be closed on May 31, 2005, did not create a modified or new contract between the parties. The letters merely served as a courtesy (as the bank was not required to provide notice pursuant to the signed agreement) to inform Appellants that the accounts would be closed pursuant to the previously signed Account Agreement entered into by Appellants and the bank.

{¶91} Accordingly, Appellants' seventh, eighth, and ninth assignments of error are overruled.

D. Trial Court Properly Transferred Action To Municipal Court

{¶92} In their tenth assignment of error, Appellants argue that the trial court erred in transferring their remaining claim, the fourth cause of action, to Delaware Municipal Court.

{¶93} Appellants' complaint asserts:

{¶94} "For the Fourth Cause of Action, Plaintiffs Thomas and Martha Greer hereby demand damages in the total sum of $369.36 for their account balances held by Defendants, plus interest at the statutory rate from May 31, 2005; and punitive damages in excess of $25,000.00, plus reasonable attorney fees."

{¶95} The trial court found, and we agree, that this is a basic breach of contract claim and is not a claim for conversion, as alleged by Appellants. "Where the duty

allegedly breached by the defendant is one that arises out of a contract, independent of any duty imposed by law, the cause of action is one of contract." *Schwartz v. Bank One, Portsmouth, N.A.* (1992), 84 Ohio App.3d 806, 810, 619 N.E.2d 10, citing *Ketcham v. Miller* (1922), 104 Ohio St. 372, 377, 136 N.E. 145. The addition of the words "intentionally" and "willfully" into a claim do not change the nature of the cause of action. Id.

{¶96} Even were the claim properly considered as one of conversion, Appellants have failed to present any material evidence that they are entitled to punitive damages on the claim. Pursuant to R.C. 2315.21(C)(1), punitive damages are not recoverable unless "[t]he actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate."

{¶97} As Appellees point out, Appellants failed to present any evidence that NCB retained the $369.36 due to malice or fraud. As such, we find that the trial court properly transferred the case to Delaware Municipal Court. Appellants' tenth assignment of error is overruled.

E. Plaintiffs' Motion For Partial Summary Judgment

{¶98} We find Appellants' eleventh assignment of error claiming that the trial court erred in denying its' motion for partial summary judgment to be without merit. The denial of a motion for summary judgment generally does not constitute a final order under R.C. 2505.02. Further, in light of our decision to affirm the granting of summary judgment in favor of Appellees, this alleged error has been rendered moot.

{¶99} Appellants' eleventh assignment of error is overruled.

{¶100} For the foregoing reasons, we find Appellants' assignments of error to be not well taken and affirm the judgment of the Delaware County Court of Common Pleas.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. SHEILA G. FARMER

HON. JOHN W. WISE

[Cite as *Greer v. Natl. City Corp.*, 2009-Ohio-5172.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

THOMAS D. GREER, et al.,	:	
	:	
Plaintiffs-Appellants	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
NATIONAL CITY CORPORATION, et al.	:	
	:	
Defendants-Appellees	:	Case No. 08 CAE 12 0076
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs assessed to Appellants.

_____
HON. PATRICIA A. DELANEY

_____
HON. SHEILA G. FARMER

_____
HON. JOHN W. WISE