**[Cite as *Williams v. El Camino Properties, L.L.C.*, 2017-Ohio-1230.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

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| Annette Williams | Court of Appeals No. L-16-1174 |
| Appellant | Trial Court No. CI0201503000 |
| v. | |
| El Camino Properties I, LLC, et al. | **DECISION AND JUDGMENT** |
| Appellees | Decided: March 31, 2017 |

* * * * *

Jeffrey W. Swiech, for appellant.

Timothy C. James and Lorri J. Britsch, for appellees.

* * * * *

**MAYLE, J.**

**{¶ 1}** Plaintiff-appellant, Annette Williams, appeals the July 13, 2016 judgment of the Lucas County Court of Common Pleas granting summary judgment in favor of defendants-appellees, El Camino Properties I, LLC, El Camino Real, El Camino Real

Carreta, Ltd., and El Camino Real Sky Ltd. ("El Camino"). For the reasons that follow, we reverse the trial court judgment.

## I. Background

**{¶ 2}** El Camino is a restaurant located on Sylvania Avenue in Toledo, Lucas County, Ohio. It has a patio-bar that is popular with patrons in the summer months. On Friday and Saturday evenings, a DJ plays music and there may be as many as 100 people at the restaurant at any given time. El Camino schedules two or three security guards and two off-duty police officers to manage the crowd on weekend nights.

**{¶ 3}** On the evening of June 14, 2014, Annette Williams ate dinner with her friends on the patio. A fight erupted nearby, and Brett Keller, an El Camino security guard, moved toward the commotion to break up the fight. As Keller prepared to approach the unruly customers, he extended a telescoping baton that he carried with him for protection. As he did so, he struck Williams in the back of her left leg, allegedly causing severe injury.

**{¶ 4}** On June 15, 2015, Williams filed a complaint against El Camino and John Doe Numbers One[1] and Two. Her complaint alleged three causes of action.

**{¶ 5}** In count one, Williams alleged that Keller—referred to in the complaint as "John Doe Number Two"—physically assaulted her while acting to further El Camino's interests. She claimed that El Camino violated its duty to exercise reasonable care by carelessly and negligently permitting or encouraging its employees to carry concealed

[1] John Doe Number One was described as a business or legal entity doing business at the Sylvania Avenue establishment.

deadly weapons for the company's business purposes; failing to prevent dangerous activity from occurring on their premises; failing to properly supervise security personnel; failing to warn the general public of dangerous activity despite knowing of the danger; failing to provide adequate security for its patrons; failing to properly hire, train, or supervise security personnel; failing to exercise ordinary care to protect her from unsafe or dangerous activities; failing to provide for her well-being; and using unjustified, unwarranted, and unprovoked force against her.

**{¶ 6}** In count two, Williams claimed negligence or negligence per se arising from Keller's violation of R.C. 2923.12, which prohibits the carrying of concealed weapons, other than handguns. She alleged that "John Doe Number Two" was acting in the scope of his employment with El Camino, thus rendering El Camino vicariously liable for his conduct.

**{¶ 7}** And in count three, Williams claimed that "John Doe Number Two" intentionally, willfully, wantonly, recklessly, or otherwise maliciously physically assaulted her, using excessive force. Again, she alleged that El Camino was vicariously liable for "John Doe Number Two's" conduct.

**{¶ 8}** The parties exchanged discovery and deposed several witnesses. Those depositions and discovery established that Keller began working at El Camino six weeks before the incident, on May 5, 2014—Cinco de Mayo. He had worked security at a number of bars and restaurants before being offered employment with El Camino. Because of the dangerous nature of his position, he carried a mouth guard and a

telescopic baton to protect himself and to control unruly patrons if needed. He testified unequivocally that El Camino did not know he carried the baton.

**{¶ 9}** On the night of the incident, a fight broke out between some patrons. The manager, Ray Martin, and the DJ tried to separate the parties and escort them out different exits of the establishment. Keller and another security guard came to assist. The parties were swinging at each other and at the staff. As Keller walked toward the argument, he extended the baton. As he did this, he hit his own leg. He did not realize that he had hit anyone else.

**{¶ 10}** Williams' friend confronted Keller and told him that he had hit her friend. Keller approached Williams and asked, "Did I hit you?" He then apologized, hugged Williams, kissed her on the cheek, and asked her if she needed anything. Williams was clear at her deposition that Keller had not intentionally hit her.

**{¶ 11}** Williams did not report the incident to El Camino that night, however, she reported it the next day. When El Camino learned that Keller had been carrying a baton, his employment was terminated. According to testimony elicited from Martin, El Camino conducted a training session the first week of May at which it oriented security personnel and instructed them that weapons were not permitted. Neither Keller nor Martin was asked whether Keller was at that training session, so it was unclear whether Keller was given notice that he was not permitted to carry the baton. Martin noted, however, that there is a sign posted on the door prohibiting weapons on the premises. Martin insisted that the sign was meant for both patrons and employees.

**{¶ 12}** On February 5, 2016, El Camino filed a motion for summary judgment. It argued (1) the baton was not a concealed, deadly weapon because Keller was not using it to exert lethal force; (2) assuming that the baton was a concealed, deadly weapon, El Camino did not permit employees to carry such weapons and did not know that Keller was carrying one; (3) Keller was acting outside the scope of his employment insofar as El Camino did not encourage, condone, or ratify the use of the baton, thus it is not vicariously liable for his conduct; (4) it breached no duty to Williams because it took ample measures to ensure the safety of its patrons, and Keller's conduct was not foreseeable given that El Camino neither condoned nor encouraged him to carry a baton; (5) under the totality of the circumstances, it did not fail to warn Williams or fail to prevent dangerous activity from occurring on its premises; and (6) there is no evidence to support Williams' negligent hiring, training, or supervision claim given that El Camino did not know that Keller carried a baton, his employment before June 14, 2014, had been without incident, it had no knowledge of past conduct that would alert it of the conduct that occurred in this incident, and it could not have reasonably anticipated Keller's actions on the day of the incident.

**{¶ 13}** In response to El Camino's motion, Williams maintained that the baton was a deadly weapon as defined by R.C. 2923.11. She insisted that a question of fact remained as to whether Keller's use of the weapon was an intentional tortious act. Thus, while she acknowledged that the impact to her leg was accidental, she claimed that Keller

intended to use the baton as a weapon to remove the unruly patrons from the establishment.

**{¶ 14}** As to respondeat superior liability, Williams argued that Keller accidentally struck her as a natural result of his duty to remove unruly patrons from the premises. She contended that to the extent that Keller's conduct was not intentionally tortious, El Camino could be held vicariously liable without evidence that it ratified Keller's conduct.

**{¶ 15}** As to her negligent hiring, training, or supervision claim, Williams argued that El Camino should have known that Keller carried a baton as part of his employment because he had worked as a bouncer for six or seven years, El Camino inquired of Keller's previous employers as to his reputation before hiring him, he had been working at El Camino for six weeks, and while he had never used the baton at El Camino before the incident, he had taken it out of its concealed location on at least one other occasion. She maintained that a fellow employee, Lorenzo Graciani, had actual knowledge that Keller carried the baton. Finally, Williams argued that it was foreseeable that a bouncer could injure a patron, yet El Camino provided no evidence of the training it performed.

**{¶ 16}** El Camino filed a reply in support of its motion. It insisted that Keller used the baton solely for his own protection and not in furtherance of El Camino's business. It emphasized that the duties of an El Camino bouncer include checking identifications, ensuring there is no underage drinking, and breaking up fights if they erupted—not removing customers by force with the use of a baton. It contended that off-duty police officers were stationed at the doors to address situations with unruly patrons, and it characterized Keller's practice of carrying the baton as an independent action. Finally, El

Camino maintained that there was no evidence that it knew that Keller carried the baton, and there was no evidence that its training of security personnel was insufficient.

**{¶ 17}** The trial court granted El Camino's motion. With respect to Williams' claim that El Camino negligently hired, trained, and supervised Keller, the trial court concluded that the record contained no evidence that El Camino had either actual or constructive knowledge that Keller was incompetent because it was undisputed that El Camino did not know that Keller carried the baton. It found that there was no reason for El Camino to believe that Keller would violate its "no weapon" policy. And although El Camino conducted no criminal background check, it vetted Keller by inquiring of employees of other establishments who had worked with him. The trial court also found that the undisputed evidence demonstrated that El Camino conducted training for security staff the first week in May of 2014.

**{¶ 18}** With respect to Williams' claim that El Camino failed to maintain the premises in a reasonably safe condition, the court found that Williams pointed to no evidence demonstrating that the premises was not reasonably safe or that dangers existed of which El Camino should have warned its patrons. It observed that El Camino provided security guards and off-duty police officers to handle unruly patrons, and there was no evidence that El Camino knew or should have known that one of its employees would carry a baton.

**{¶ 19}** Finally, the court concluded that El Camino could not be held liable under the doctrine of respondeat superior because Keller acted outside the scope of his employment in carrying the baton. In support of this conclusion, it pointed to Keller's testimony that he carried the baton solely for his self-protection, and to El Camino's policy expressly prohibiting weapons on the premises. It determined that Keller was not promoting or facilitating El Camino's business and that El Camino did not authorize or ratify Keller's use of the baton.

**{¶ 20}** It is from this decision that Williams appealed. In her sole assignment of error, she argues that "[t]he trial court erred when it granted summary judgment in favor of Appellee El Camino Real[.]" She identifies two issues pertinent to her assignment of error:

> I. Can a business be absolved of liability under the doctrine of *respondeat superior* when an employee commits a tort within the scope of their employment?
>
> II. Can a business be liable for its failure to properly train and/or supervise an employee who [sic] actions cause injury?

## II. Standard of Review

**{¶ 21}** Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129,

572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

**{¶ 22}** When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826,

675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

## III. Law and Analysis

**{¶ 23}** In her sole assignment of error, Williams challenges two aspects of the trial court's summary-judgment decision. The first is the trial court's conclusion that Keller was acting outside the scope of his employment because he carried the baton for self-protection in violation of El Camino's posted no-weapons policy. The second is the trial court's conclusion that because El Camino lacked actual or constructive knowledge that Keller carried a baton, conducted training the first week in May, and posted on its door a no-weapons policy, Williams cannot establish that El Camino negligently hired, trained, or supervised Keller. We address each of these issues separately.

### A. Respondeat Superior Liability For Keller's Negligence

**{¶ 24}** Williams claims that Keller accidentally struck her with the baton and that El Camino is liable for Keller's negligence under the doctrine of respondeat superior. Williams insists that while Keller carried the baton for his personal safety, he did so in performing the duties of his job as a security guard. She maintains that Keller was acting within the scope of his employment when he struck her because the incident occurred as a natural result of his duty to remove unruly patrons from the bar. She contends that the fact that Keller may have violated El Camino policy prohibiting weapons is immaterial.

**{¶ 25}** "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." *Byrd v. Faber*, 57 Ohio St.3d 56, 58, 565 N.E.2d 584 (1991). An employee's act is within the scope of 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 v. A. B. C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 278, 344 N.E.2d 334 (1976), citing *Tarlecka* v. *Morgan*, 125 Ohio St. 319, 324, 181 N.E. 450 (1932).

**{¶ 26}** Whether an employee is acting within the scope of employment is ordinarily a question of fact to be resolved by the jury. *Posin* at 278. "Only when reasonable minds can come to but one conclusion does the issue regarding scope of employment become a question of law." *Osborne v. Lyles*, 63 Ohio St.3d 326, 330, 587 N.E.2d 825 (1992).

**{¶ 27}** Here, the trial court determined that reasonable minds could conclude only that Keller was acting outside the scope of his employment. It reached this conclusion based on Keller's purportedly undisputed testimony that he carried the baton only for self-protection, and based on the fact that Keller carried the baton in violation of El Camino's no-weapons policy. While the court acknowledged that "dealing with unruly patrons" was one of Keller's job duties, it emphasized that "self-protection" was not. It characterized the baton as an "instrumentality entirely unrelated to [El Camino's] business [and] a risk not contemplated by Keller's employment."

**{¶ 28}** It is true that an employer is not liable for the independent, self-serving acts of his employees "which in no way facilitate or promote his business." *Byrd* at 58. But

"[n]ot every deviation from the strict course of duty" will relieve an employer of liability for its employee's acts, nor will the fact that an employee "incidentally does something for himself" in performing the duties of his job. *Posin* at 278-279. "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.* at 278, citing *Amstutz* v. *Prudential Ins. Co.*, 136 Ohio St. 404, 409, 26 N.E.2d 454 (1940). Importantly, an employee's noncompliance with his employer's policies "is not an absolute shield from liability" and "is not wholly dispositive of the issue [of] whether the employee was acting outside the scope of employment." *Davis v. May Dep't Stores Co.*, 9th Dist. Summit C.A. No. 20396, 2001 Ohio App. LEXIS 4321, *21 (Sept. 26, 2001).

**{¶ 29}** El Camino argues that its security guards were tasked with checking identification, ensuring that under-aged patrons were not served alcohol, and maintaining crowd control. It insists that Keller was subject to the no-weapons policy posted at the establishment, and despite acknowledging that patrons may become unruly, it maintains that it did not advance El Camino's interests for Keller to carry a baton. While it represents that it conducted training for staff hired for the summer season, at which time the no-weapons policy was purportedly explained, it says only that it was "likely" that Keller attended that meeting.

**{¶ 30}** After reviewing the record, we find that there exists a genuine issue of material fact as to whether Keller was acting within the scope of his employment when

he inadvertently struck Williams with the baton. The testimony elicited at the witnesses' depositions demonstrates the dangers faced by employees who are hired to provide security in establishments like El Camino that serve alcohol to its patrons. Keller described his line of work as a "dangerous profession," and spoke of instances in his career where unruly patrons brandished weapons, including guns and knives. Graciani, another El Camino security employee who was deposed, commented that he had had teeth loosened after being hit in the face by unruly patrons at establishments where he worked. He said that many bouncers, including Keller, carry mouth guards because of this risk. In addition to this, Keller stated that it was a matter of preference whether bouncers carry batons while on the job. He characterized the baton as a "device that is used for self-protection to pretty much stray away any danger if necessary," but he also described it as a device "*used for containing * * * a large group of people who you're trying to, pretty much trying to control and get out from your establishment*." (Emphasis added.) Martin, Keller's manager, testified that "the job of security guards at El Camino was to remove any unruly patrons from the establishment." Thus, a reasonable person could conclude that Keller used the baton, at least in part, to maintain crowd control and his actions were therefore within the scope of employment.

**{¶ 31}** Martin also testified that El Camino security guards are sometimes called upon to break up fights, and he testified that the group of patrons who were fighting on the evening in question actually took swings at the employees who were trying to break up the fight. So while Keller carried the baton for self-protection, his need to protect

himself could be viewed as "an ordinary and natural incident" or "natural, direct, and logical result of" the danger he faced in performing the duties of his job.

**{¶ 32}** While El Camino insists that its general no-weapons policy applied to security personnel as well as to patrons and other employees, we find that Keller's alleged violation of this policy does not automatically shield El Camino from liability and "is not wholly dispositive" of whether Keller was acting outside the scope of his employment.[2] *Davis v. May Dep't Stores Co.*, 9th Dist. Summit C.A. No. 20396, 2001 Ohio App. LEXIS 4321 at *21. Moreover, we find that there is a question of fact as to whether El Camino actually communicated this policy to Keller.

**{¶ 33}** The trial court concluded that Keller's carrying of the baton was self-serving conduct that cannot reasonably be construed as promoting or facilitating El Camino's business. But whether the conduct giving rise to the tort was calculated to facilitate or promote the business of the employer is relevant only where it is alleged that the employer should be held responsible for an employee's *intentional* tort. *Byrd*, 57 Ohio St.3d at 58, 565 N.E.2d 584. Here, despite the broad allegations in her complaint, Williams concedes that Keller did not intentionally strike her with the baton and that his conduct was merely negligent.

**{¶ 34}** Finally, the trial court concluded that El Camino did not authorize or ratify Keller's possession of the baton, and this was demonstrated by the fact that Keller was

[2] We note that El Camino argued in its motion for summary judgment that "Mr. Keller did not carry the baton to use as a weapon," which suggests that Keller may not have violated El Camino's no-weapons policy at all.

terminated after El Camino learned that he had been carrying the baton. But ratification is required only if an employee's conduct is outside the scope of employment. *Davis* at *22, citing *Fulwiler v. Schneider*, 104 Ohio App.3d 398, 406, 662 N.E.2d 82 (1st Dist. 1995). Because we find that a question of fact exists as to whether Keller was acting within the scope of his employment at the time Williams was injured, evidence of ratification was not required.

**B. Negligent Hiring, Training, or Supervision**

**{¶ 35}** Williams next argues that El Camino negligently hired, trained, and supervised Keller. She contends that El Camino should have known that Keller carried a baton as part of his employment because its manager inquired about Keller's reputation before hiring him. She contends that it is reasonable to assume that El Camino knew that Keller carried a baton because he had been working there six weeks and had taken it out at some point before the incident. She also claims that Graciani knew that Keller owned the baton and she suggests that this created a question of fact as to whether El Camino had actual notice that Keller carried a baton.

**{¶ 36}** Williams also argues that without proper training and supervision, it was foreseeable that a bouncer would accidentally injure a patron. While she acknowledges that El Camino claims to have conducted a training session for its summer hires, she emphasizes that there is no evidence of what information was covered at that training session, and there is no evidence that Keller attended the training session. In addition to this, Graciani testified that he personally never received any training, and El Camino did

not distribute any written procedures to its employees. Williams insists that a reasonable juror could conclude that Keller received no training at all.

**{¶ 37}** The elements of negligent hiring, training, and supervision are essentially identical. *Sheldon v. Kettering Health Network*, 2015-Ohio-3268, 40 N.E.3d 661, ¶ 41 (2d Dist.). The plaintiff must prove "(1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission caus[ed] the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining [or training or supervising] the employee [w]as the proximate cause of plaintiff's injuries." *Id.*, citing *Evans v. Ohio State Univ.*, 112 Ohio App.3d 724, 739, 680 N.E.2d 161 (10th Dist.1996).

**{¶ 38}** El Camino argues that Williams' claim for negligent hiring, training, and supervision must fail because she cannot establish each of these elements. It maintains that even assuming that Keller was incompetent—which the trial court did for purposes of its decision—there is no evidence that El Camino had actual or constructive knowledge of his alleged incompetence.

**{¶ 39}** As to its lack of actual knowledge of Keller's alleged incompetence, El Camino points to Martin's testimony that El Camino did not permit its security guards to carry batons. It also emphasizes that Keller testified that El Camino did not know he carried a baton, and that he had not previously used the baton at El Camino.

**{¶ 40}** As to its lack of constructive knowledge, El Camino points out that it vetted Keller before hiring him, Keller had not previously used the baton, and the record

does not establish that his prior employers knew he carried the baton. As far as Graciani knowing that Keller owned the baton, El Camino clarifies that Graciani testified that he began working at El Camino the month *after* the incident occurred, thus his purported knowledge cannot be imputed to El Camino. And it points out that Graciani said that he did not know that Keller carried the baton with him at El Camino.

**{¶ 41}** El Camino disputes that it failed to properly train Keller. It argues that it conveyed the no-weapons policy at a training that took place before the summer season began, and its verbal instruction to its employees at that training was sufficient. El Camino also maintains that the incident was not foreseeable. It insists that even if Keller did not attend the pre-summer training session, its no-weapons policy was posted at the entrance. It maintains that there had been no other instances where security personnel carried batons, it had no issues with Keller in the six weeks he had been working there, and security guards did not need to exercise force to perform their jobs because there were off-duty police officers stationed at the entrance to the restaurant to address patrons who had been asked to leave.

**{¶ 42}** Keller's alleged incompetence was his carrying a baton while working at El Camino. While we recognize that Keller and Martin both testified that El Camino did not know that Keller carried the baton, we find that this is not the only fact pertinent to the "knowledge" element of Williams' negligent hiring, training, and supervision claim. The larger question is whether El Camino ever actually informed Keller that no weapons—including batons—were to be carried on El Camino's premises. If it didn't inform him,

then one could reasonably conclude that El Camino should have known that Keller was incompetent insofar as he was ignorant of El Camino's no-weapons policy.

**{¶ 43}** Moreover, while El Camino contends that it held a meeting with security guards before the summer season, it claims only that it is "likely" that Keller attended this training—not that he was, in fact, present. And with respect to the no-weapons sign on the door, while Martin testified that this policy was applicable to both employees and patrons, there was no evidence that it was ever conveyed to Keller. A reasonable person could conclude that El Camino failed to make clear to Keller that batons could not be carried by security personnel despite the dangers they may face in confronting intoxicated, unruly customers. A reasonable person could also conclude that it was foreseeable that an employee charged with this sometimes dangerous task may carry with him an instrument that may afford protection in performing that duty. Summary judgment as to Williams' negligent hiring, training, and supervising claim was, therefore, inappropriate.

**{¶ 44}** Accordingly, we find Williams' sole assignment of error well-taken.

## IV. Conclusion

**{¶ 45}** Because a genuine issue of material fact exists as to whether Keller was acting within the scope of his employment and whether El Camino was negligent in its hiring, training, and supervision of Keller, we find Williams' assignment of error well-taken. We reverse the July 13, 2016 judgment of the Lucas County Court of Common

Pleas, and remand the matter for further proceedings consistent with this decision. Costs are assessed to El Camino under App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

James D. Jensen, P.J. _____
JUDGE

Christine E. Mayle, J. _____
CONCUR.
JUDGE