ORIGINAL

IN THE SUPREME COURT OF OHIO
APPEAL FROM THE FIFTH DISTRICT COURT OF APPEALS

Thomas D. Greer, et al.,	:	
	:	
Plaintiffs-Appellants.	:	**Case No. 09-2061**
	:	
vs.	:	**Court of Appeals**
	:	**Case No. 08 CAE 12 0076**
National City Corporation, et al.	:	
	:	
Defendants-Appellees.	:	

MEMORANDUM OF DEFENDANTS-APPELLEES NATIONAL CITY CORPORATION, NATIONAL CITY BANK, NIKKI JOHNSTON, GREG MULACH, AND DAVID WEISS IN OPPOSITION TO JURISDICTION

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EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This is not a case of public or great general interest. As far as Appellees are aware, Appellants are the only bank customers who have *ever* argued in an Ohio court that the law imposes upon a bank a duty to consult with its customer prior to closing an account where the contract between the bank and the customer expressly provides that no such obligation exists. There is no conflicting case law in the appellate courts on the issue of whether a bank has such a duty. *This is the only case law in Ohio on this issue.* Only Appellants have set forth this novel argument.

Appellants state that closing bank accounts is a common occurrence. While that is true, it is not a common occurrence for a customer, who has been given advanced notice that his account will be closed by the bank and a warning to stop writing checks on the account, to continue writing checks on his account and then, when his checks do not clear before the accounts are closed, pursue a lawsuit against the bank all the way to the highest court in the state. (That, of course, is what Appellants did in this case.) Customers who place assets with depository banks recognize that their relationship with their bank is governed by the contract they enter with the bank when initiating the banking relationship. Appellants are the only ones who take umbrage with this commonly-accepted aspect of a bank-customer relationship. Despite Appellants' attempt to enlarge this case into one in which the outcome will have an effect on citizens in Ohio, it is obvious that this is a fact-specific case that concerns Appellants and no one else.

Moreover, this Court should not accept jurisdiction in this case because the uncontroverted evidence in the record demonstrates that *National City Bank did provide weeks of advanced notice* to Appellants that their accounts would be closed "at the end of May" of 2005 if they had not already done so and that Appellants were also urged to stop writing checks on their

accounts. If there is a duty in Ohio to notify and consult with a customer before closing an account, National City Bank fulfilled this duty. Thus, this Court should decline to accept jurisdiction because, even if this Court were to determine that a duty to notify and consult with a customer exists, such a determination will not warrant a reversal of the trial court's decision because of the specific facts of this case.

Appellants' claim that the issue of whether National City Bank and National City Corporation are one and the same entity is a matter of public or great general interest is without merit. The reason why the trial court dismissed Appellants' defamation claim against National City Bank is simple: Appellants missed the one year statute of limitations. Appellants filed an original action in which National City Corporation was the only named corporate defendant. Appellants voluntarily dismissed and then re-filed their lawsuit for the first time naming National City Bank as a defendant. However, Appellants did not name National City Bank as a defendant until the one year statute of limitations had run on their defamation claim. It is a commonly-accepted part of our jurisprudence that this is the result of a plaintiff's failure to sue the proper entity within the applicable statute of limitations. Appellants' neglect in failing to sue the proper entity does not create a novel issue that must be reviewed by this Court.

If this Court did accept jurisdiction, this Court's decision on this issue would not create case law that would be applicable to other cases. This is because Appellants' argument could not be applied generally to all parent-subsidiary relationships. Rather than proposing that all parent corporations are essentially the same entity as the subsidiary (and thus liable for the acts of the subsidiary), Appellants are contending that National City Corporation is liable for the acts of National City Bank because *these two specific entities* are one and the same. Thus, this Court's decision would have no applicability to other cases being litigated in Ohio except those involving

National City Bank and National City Corporation. Such a fact-specific case does not present a matter of public or great general interest.

Finally, Appellants argue that this case is a matter of public or great general interest because this Court has not yet addressed the proposition that malice is a jury question. *See* Memo. in Support of Jurisdiction at 5. First and foremost, Appellants' argument that malice is always a jury question is not properly before this Court because it was raised for the first time in their Memorandum in Support of Jurisdiction. *See State ex rel. Porter v. Cleveland Dep't of Pub. Safety*, 84 Ohio St. 3d 258, 1998 Ohio 539, 703 N.E.2d 308; *Miller v. Wikel Mfg. Co., Inc.* (1989), 46 Ohio St.3d 76, 78, 545 N.E.2d 76.

Moreover, contrary to Appellants' assertions, this Court has already determined that malice is not a jury question where a plaintiff has failed to present any evidence that a statement was made with actual malice. *See Jacobs v. Frank* (1990), 60 Ohio St.3d 111, 119, 573 N.E.2d 609. The case cited by Appellants, *Mayes v. City of Columbus*, involved malice in a malicious prosecution claim, and Appellants have failed to demonstrate that the court's holding in *Mayes* has been applied to a defamation claim. *See Mayes v. City of Columbus* (1995), 105 Ohio App.3d 728, 737, 664 N.E.2d 1340. Thus, not only does this Court's decision in *Jacobs* demonstrate that the issue of whether a plaintiff has presented evidence of actual malice is not always a jury question, but no case law has come out since *Jacobs* that would challenge this Court's holding. There is no split or contradicting case law in Ohio on this issue. Appellants have failed to present a matter of public or great general interest regarding the dismissal of their defamation claim. This Court should decline to accept jurisdiction of this appeal.

STATEMENT OF THE CASE AND FACTS

Upon entering into a depository and banking relationship with National City Bank on January 28, 2003, Appellants Mr. and Mrs. Greer entered into a contract (i.e. the Personal Account Agreement) with National City Bank whereby their accounts could be closed by National City Bank without cause and without prior notice to Appellants. Mr. Greer testified in the lower court that he understood that these were the rules that governed the accounts and that he expected the bank to abide by those rules.

On April 21, 2005, Appellants drove to National City Bank's branch in Delaware, Ohio. Mrs. Greer entered the bank and asked for seven newly minted dollar coins and seven crisp, new one dollar bills. The bank teller provided Mrs. Greer with the newest bills available at the branch and advised Mrs. Greer that the bank did not have any newly minted coins, but she did provide Mrs. Greer with a Sacagawea coin. After Mrs. Greer returned to the car and relayed this information to Mr. Greer, Mr. Greer immediately got out of the car, entered the bank alone, and asked for crisp bills or newly minted coins. The teller advised Mr. Greer that the bank did not have those items and then contacted other branches in order to locate those items, but to no avail.

Nikki Johnston, the branch office manager, testified that Mr. Greer then began to behave in a disruptive and unacceptable manner, and that after Mr. Greer refused to leave the bank as she requested, Johnston entered her office and called National City Security to report Mr. Greer's disruptive behavior and to request assistance in having Mr. Greer leave the bank. Johnston told bank security that she had a customer in her office who was being disruptive; that National City Bank had problems with him in the past, particularly with female employees; that she had asked him to leave and that he was unwilling to do so. According to Mr. Greer, he then raised his voice and stated that he wanted everyone to witness that he was leaving the bank, that Johnston

had ordered him to leave the bank, and that he would be charged with criminal trespassing if he did not leave. Mr. Greer then left the bank.

National City Bank Security contacted the Delaware Police Department to assist Johnston. Shortly thereafter, Officer Nelson of the Delaware Police Department arrived at the bank. Johnston responded to the questions asked by Officer Nelson by explaining what had just occurred, but she did not file criminal charges against Mr. Greer.

Following the April 21, 2005 incident, National City Bank decided that Appellants' accounts should be closed. On May 10, 2005, Appellee Greg Mulach, a Senior Vice President of National City Bank, sent a letter to Appellants stating that National City Bank would close their accounts "at the end of May" if Appellants had not already done so by that date. Mulach also reminded Appellants that the Personal Account Agreement provided that the bank has the right to close the accounts without prior notice to Appellants.

On May 31, 2005, Brent Voss, a National City Bank employee, received instructions to close Appellants' accounts on that day. Accordingly, Voss closed Appellants' accounts at approximately 4:00 p.m. on that day. Immediately after closing Appellants' accounts, National City Bank forwarded the remaining balances in Appellants' accounts via official checks to Appellants. Unbeknownst to National City Bank, Appellants had written twelve checks in the eight (8) days leading up to May 31, 2005; as such, those twelve checks which were presented to National City Bank after Appellants' accounts were closed on May 31, 2005 were not honored.

Despite being under no legal or contractual obligation to do so, National City Bank assisted Appellants by reopening their accounts and accepting the twelve checks. However, Appellants failed to maintain required minimum balances in their reopened accounts and, in

accordance with bank policy, fees were assessed on those accounts pursuant to the Personal Account Agreement.

On April 21, 2006, Appellants filed their initial complaint against National City Corporation, Johnston, and Mulach. National City Bank was not named in this Complaint. On March 29, 2007, Appellants voluntarily dismissed this case. On July 18, 2007, Appellants filed a second complaint which for the first time included as defendants National City Bank and David Weiss, National City Bank's District Sales Manager for the Delaware, Ohio area. The second complaint contained the following causes of action: (1) a defamation claim asserted by Mr. Greer against National City Corporation, National City Bank, and Johnston; (2) a claim by Appellants for "breach of the duties of notifying, informing, consulting with, and/or coordinating with Plaintiffs for the proper closing and accounting of their depository accounts" against National City Corporation, National City Bank, Mulach, and Weiss; (3) a breach of contract claim by Appellants against National City Corporation, National City Bank, Mulach, and Weiss; (4) a statutory wrongful dishonor claim by Appellants against National City Corporation, National City Bank, Mulach, and Weiss; and (5) a claim asserted by Appellants against National City Corporation and National City Bank for an alleged wrongful withholding of a portion of the balances in Appellants' accounts after the May 31, 2005 closing of these accounts.

All parties moved for summary judgment, and on December 2, 2008, the trial court: (1) granted National City Corporation's motion for summary judgment and dismissed all of Appellants' claims against it and denied Appellants' motion for partial summary judgment against National City Corporation; (2) granted National City Bank and Johnston's motion for summary judgment on Appellants' defamation claim and denied Appellants' motion for partial summary judgment on this claim; (3) granted National City Bank, Mulach, and Weiss's motion

for summary judgment on Appellants' breach of contract claim, their breach of the "duties of notifying, informing, consulting with, and/or coordinating with Plaintiffs" claim, and their wrongful dishonor claim and denied Appellants' motion for partial summary judgment on these claims; and (4) denied Appellants' and National City Bank's summary judgment on Appellants' fourth cause of action. As to the fourth cause of action, the trial court found that Appellants failed to state a claim upon which the Court of Common Pleas has monetary jurisdiction, and transferred the fourth cause of action to the Delaware Municipal Court for trial. This decision was affirmed in full by the Fifth District Court of Appeals.

As is demonstrated by the issues raised in Appellants' Memorandum in Support of Jurisdiction, Appellants have chosen not to appeal to this Court the dismissal of most of the claims asserted by them. The claims presented to this Court on appeal are: (1) the defamation claim against National City Bank, National City Corporation, and Johnston; and (2) the claim for "breach of the duties of notifying, informing, consulting with, and/or coordinating with Plaintiffs for the proper closing and accounting of their depository accounts" against National City Corporation and National City Bank.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: There is no statutory or case law in Ohio which creates a duty on the part of a depository bank to consult with its customers in order to determine whether any outstanding checks exist prior to closing their accounts.

Although Appellants argue that National City Bank had a duty to contact Appellants and to consult with them prior to closing their accounts so as to ascertain whether any outstanding checks existed, Appellants concede that Ohio law does not currently place this obligation upon

National City Bank and that Appellants are asking this Court to create new law. *See* Memo. in Support of Jurisdiction at 9. In fact, *Appellants have no statutory or common law authority from Ohio supporting this novel argument.*

Appellants contend that this alleged duty is inherent in the duties of good faith and ordinary care created by Ohio Revised Code Section 1304.03(A), which provides that an agreement between a bank and its customers "cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure." *See* Memo. in Support of Jurisdiction at 10, citing O.R.C. 1304.03(A). However, the Personal Account Agreement that governed the relationship between Appellants and National City Bank explicitly stated that National City Bank was *not* required to give notice before closing an account. Good faith would not have required National City Bank to give such notice when requiring such notice would completely contradict the terms of the contract between the parties. The provision in the Personal Account Agreement providing that National City Bank need not give notice before closing the account is not a limitation on National City Bank's liability when it acts in bad faith; rather, this provision provides that it is *not* an act of bad faith for National City Bank to close the accounts without notice because Appellants expressly agreed that the Bank had a right to do so.

Appellants freely and willingly chose to enter into a contract whereby they agreed that National City Bank had the right to close their accounts without notice. It would be improper to find a lack of good faith on the part of National City Bank for simply enforcing the agreed upon terms of the contract.

Searching vigorously for case law to support their position, Appellants have located two, non-Ohio cases: a 1936 case from the District of Columbia and a 1911 case from New Jersey.

Ambruster v. Nat'l Bank of Westfield (1936), 116 N.J.L. 122; *Jaselli v. Riggs Nat'l Bank* (1911), 36 App. D.C. 159. However, both of those cases are factually distinguishable from the case at bar because, unlike this case, there is no indication that the customers in those cases voluntarily entered into an agreement stating that the bank had the right to close the accounts without notice.

Moreover, contrary to Appellants' assertions, the Supreme Court of Maine case of *C-K Enterprises, Inc. v. Depositors Trust Company*, which Appellants have cited, does not stand for the proposition that there is a general legal duty to consult with a customer prior to closing an account. The duty on the part of the bank in *C-K Enterprises, Inc.* was a *contractual duty* arising from the banking agreement between the parties. *C-K Enterprises, Inc. v. Depositors Trust Co.* (Me. 1991), 438 A.2d 262, 264. The Personal Account Agreement in this case had no provision creating such a duty; in fact, it had a provision stating that no such duty existed.

However, *assuming arguendo* that there was a duty on the part of National City Bank to notify and consult with Appellants before closing their accounts, the uncontroverted evidence in the record establishes that National City Bank did provide weeks of advanced notice by letter to Appellants on May 10, 2005, informing them that their accounts would be closed at the end of May if Appellants had not already closed them. The evidence also demonstrates that, around the first week of May, Mulach explicitly advised Mr. Greer to stop writing checks on the accounts. It was not necessary for National City Bank to inquire about whether there were any outstanding checks on May 31, 2005, because Mulach already had several conversations with Mr. Greer in which Greer "completely understood" that he must have all of his checks cleared by then. Thus, if there was a duty to notify Appellants and consult with them regarding any outstanding checks, the uncontroverted evidence proves that this duty was fulfilled.

Finally, contrary to Appellants' assertions, the closing of Appellants' accounts were not "premature". The uncontroverted evidence in the record demonstrates that National City Bank did close Appellants' accounts at the end of the business day on May 31, 2005. Although it is true that Branch Manager Bryan Hill had been instructed to close the accounts on May 31, 2005, "as early in the day as possible", Hill subsequently assigned this duty to Brent Voss, who closed the accounts at approximately 4:00 p.m. on May 31, 2005. Appellants' characterization of the closing of Appellants' accounts as "premature" is without merit.

Proposition of Law No. II: There is no evidence in the record which demonstrates that National City Bank and National City Corporation are the same entity.

Appellants named National City Corporation, the parent company of the subsidiary National City Bank, as a party to this action. However, the undisputed evidence before the trial court established that Appellants' banking relationship was solely with National City Bank and its employees and that Appellants never had any relationship with National City Corporation. Appellants argue that the claims against National City Corporation were improperly dismissed because National City Bank and National City Corporation are "the same entity". Similarly, Appellants argue that the statute of limitations on their defamation claim against *National City Bank* did not expire because they named *National City Corporation* within the one year statute of limitations.

Appellants' argument is without merit. The uncontroverted evidence submitted before the trial court demonstrated as follows: National City Corporation has been organized as a foreign corporation under the laws of Delaware since August 17, 1972, that it has been registered with the Ohio Secretary of State to do business in this state since April 20, 1973, and that it is

primarily regulated by the Federal Reserve. The uncontroverted evidence also demonstrated that National City Bank is a federally chartered national bank organized and existing by virtue of the laws of the United States of America, that it is doing business under authority granted by the Office of the Comptroller of the Currency, and that it is primarily regulated by the Office of the Comptroller of the Currency. Thus, the uncontroverted evidence demonstrates that National City Bank and National City Corporation exist as separate entities.

Appellants point to a filing from the Ohio Secretary of State's website that reflects that "National City Bank" has been registered as a trade name as "evidence" that National City Bank is not a separate entity. However, National City Corporation is not named anywhere in this document. Therefore, this document does not establish that National City Bank was a trade name of *National City Corporation* during the relevant time period.

More importantly, even if National City Corporation had registered National City Bank as a trade name, this does not establish that National City Bank does not also exist as a separate entity under the laws of the United States. The existence of a federally chartered bank with the name "National City Bank" does not preclude this same name from being registered and used as a trade name in the State of Ohio. In summary, National City Bank submitted evidence which demonstrated that it did in fact exist as a separate entity that was organized under the laws of the United States, and Appellants offered no evidence that it was not a separate entity.

Appellants' assertion that National City Bank and National City Corporation are the same entity is unsupported by the evidence; thus, the trial court properly dismissed all claims asserted against National City Corporation, as Appellants had no relationship with it. The trial court also properly dismissed the defamation claim against National City Bank based on the statute of limitations.

Proposition of Law No. III: There is no evidence in the record that Nikki Johnston exhibited malice in reporting the events of April 21, 2005.

The trial court dismissed Appellants' defamation claim against Johnston, National City Corporation, and National City Bank[1] because it concluded that Johnston was entitled to the defense of qualified privilege. Appellants do not deny that the five elements of the defense of qualified privilege are met. Rather, Appellants argue that they successfully offered evidence that Johnston made the statements with malice, thereby overcoming the qualified privilege defense.

This Court has previously determined that when a defendant possesses a qualified privilege regarding statements contained in a communication, that privilege can only be defeated by a showing, based on clear and convincing evidence, that the communication was made with actual malice. *McCartney v. Oblates of St. Francis deSales* (1992), 80 Ohio App. 3d 345, 357, 609 N.E.2d 216, citing *Jacobs*, 60 Ohio St.3d 111, 573 N.E.2d 609, paragraph two of the syllabus. The Supreme Court of Ohio has defined actual malice as "acting with the knowledge that the statements are false or acting with reckless disregard as to their truth or falsity." *Id.*, quoting *Jacobs*, 60 Ohio St.3d 111, 573 N.E.2d 609, paragraph two of the syllabus. A plaintiff can overcome the defense only with evidence that would demonstrate with convincing clarity that the defendant was aware of a high probability of falsity of the statement. *Id.*, citing *Jacobs*, 60 Ohio St.3d 111, 119, 573 N.E.2d 609.

In order to defeat qualified privilege, Appellants were required to set forth evidence that demonstrated that Johnston knew that her statements were probably false. For example, an admission from Johnston that she was lying to the police when she stated that Mr. Greer was disruptive or an admission that she made the statement without having a subjective belief that the

[1] As demonstrated earlier, the trial court also dismissed the defamation claim against National City Bank because Appellants failed to file this claim within the applicable statute of limitations.

statement was true would support an assertion that she was aware of a high probability of falsity. Appellants failed to offer such evidence of actual malice.

Rather, Appellants have pointed to statements made by Kelly Watts and Brent Voss (National City Bank employees) that attest to an ongoing dispute between some National City Bank employees and Appellants regarding their accounts. Memo. in Support of Jurisdiction at 14. This evidence simply demonstrates that some National City Bank employees had discussed difficulties that they had previously experienced in dealing with Mr. Greer. This is not evidence that Johnson knew that similar statements that she had made to Officer Nelson were *false*. On the contrary, the evidence demonstrates that based on her personal observations on April 21, 2005, as well as what she had heard from other bank employees about Mr. Greer, Johnston had a good faith and reasonable belief that Mr. Greer was being disruptive and that he would not leave the bank. Appellants simply did not set forth evidence that could overcome Johnston's qualified privilege. Therefore, the trial court's granting of summary judgment on the defamation claim was proper.

Appellants argue that proof of actual malice can be inferred from circumstantial evidence, and thus, that malice is always a jury question. *See* Memo. in Support of Jurisdiction at 13-14. This argument is without merit. First and foremost, *Mayes v. City of Columbus*, the case cited by Appellants for this proposition, involved a claim of malicious prosecution. *See Mayes v. City of Columbus* (1995), 105 Ohio App.3d 728, 737, 664 N.E.2d 1340. Appellants have not cited to any case law demonstrating that *Mayes* has been applied to malice as it is used in a defamation claim. In fact, the word "malice" has two completely different meanings depending on the cause of action involved. *See Mayes*, 105 Ohio App.3d 728, 737, 664 N.E.2d 1340, quoting *Criss v. Springfield Twp.* (1990), 56 Ohio St. 3d 82, 85, 564 N.E.2d 440 (defining

"malice" for purposes of a claim of malicious criminal prosecution as "an improper purpose, or any purpose other than the legitimate interest of bringing an offender to justice"); *McCartney*, 80 Ohio App. 3d 345, 357, 609 N.E.2d 216, citing *Jacobs*, 60 Ohio St.3d 111, 573 N.E.2d 609, paragraph two of the syllabus (defining "malice" for purposes of a defamation claim as "acting with the knowledge that the statements are false or acting with reckless disregard as to their truth or falsity").

Moreover, this Court has already decided that malice is not a jury question in a case in which a plaintiff fails to present evidence that a defendant made the statement with actual malice. *See Jacobs*, 60 Ohio St.3d 111, 119, 573 N.E.2d 609. In *Jacobs*, this Court concluded that the trial court properly granted summary judgment in favor of the defendant on a defamation claim based on the qualified privilege defense where no evidence that the statement was made with actual malice had been presented by the plaintiff. *See id.* ("We conclude that Jacobs failed to meet his burden of showing a genuine issue of fact exists with respect to the issue of whether Frank acted with actual malice."). Thus, contrary to Appellants' assertion, this Court determined in *Jacobs* that the issue of whether a defendant acted with actual malice in making a statement is not a question that must be submitted to a jury. This Court revisited its holding in *Jacobs* on at least two occasions. *See Jackson v. City of Columbus*, 117 Ohio St. 3d 328, 2008 Ohio 1041, 883 N.E.2d 1060; *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Const. Trades Council*, 73 Ohio St. 3d 1, 1995 Ohio 66, 651 N.E.2d 1283. At no time did this Court hold that the issue of malice must always be decided by a jury.

It is a well-settled part of Ohio case law that where a defendant demonstrates that she is entitled to the defense of qualified privilege and where the plaintiff fails to present evidence of actual malice, summary judgment is appropriate. Here, the trial court determined that Appellants

had presented no evidence, direct or indirect, that Johnston acted with knowledge that her statements were probably false or with reckless disregard as to their truth or falsity. Thus, dismissal of this claim on summary judgment was proper.

CONCLUSION

Defendants-Appellees National City Corporation, National City Bank, Nikki Johnson, Greg Mulach, and David Weiss have demonstrated that this case is not a matter of public or great general interest. Defendants-Appellees respectfully request that this Court decline jurisdiction in this case and dismiss the appeal filed by Plaintiffs-Appellants Thomas D. Greer and Martha N. Greer.

Respectfully submitted,

LANE, ALTON & HORST LLC

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served on this 11th day of December, via regular U.S. mail, postage prepaid upon the following:

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