

[Cite as *Housel v. Raytheon Aircraft Servs., Inc.*, 2009-Ohio-2730.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92259

JAY D. HOUSEL, ET AL.

PLAINTIFFS-APPELLANTS

vs.

RAYTHEON AIRCRAFT SERVICES, INC.

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART; AND
REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-628569

BEFORE: Rocco, P.J., McMonagle, J., and Sweeney, J.

RELEASED: June 11, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} In this action seeking to impose liability on a former employer for injury received in a workplace, plaintiffs-appellants Jay D. Housel and his wife Clarissa appeal from the trial court order that granted summary judgment on their claims to defendant-appellee Raytheon Aircraft Services, Inc.¹

{¶ 2} The Housels present one assignment of error. They assert Raytheon failed to sustain its burden to prove the absence of any genuine issues of material fact with respect to their causes of action, viz., “tortious conduct” based upon the doctrine of respondeat superior and employer intentional tort.

{¶ 3} Upon a review of the record, this court finds no error with respect to summary judgment in favor of Raytheon on the Housels’ claim of employer intentional tort; that portion of the trial court’s decision is affirmed. However, Raytheon was not entitled to summary judgment on the Housels’ claim of liability in tort under the doctrine of respondeat superior. Therefore, a portion of the trial court’s decision is reversed on that basis and this case is remanded for further proceedings.

¹The record reflects the Housels also named Martin Smallwood as a defendant in the case, but never obtained service upon him; thus, he was dismissed as a party, and their case proceeded against only Raytheon.

{¶ 4} The record reflects appellant Jay D. Housel began working for Raytheon in July 2003, when Raytheon acquired “Flight Options,”² the company that originally hired Housel. Housel initially performed the duties of an aircraft mechanic, but, just prior to Raytheon’s acquisition, had been transferred to an office position, that of “maintenance controller.”

{¶ 5} The tool box Housel used in his previous position remained in “Hanger 4,” but he performed his new duties in the “Operations Control Center” located in Hanger 3. Housel worked in this area with two others, one of whom was Martin Smallwood. Smallwood was a “fleet reliability manager.” It can be gleaned from the record that Smallwood was responsible to ensure aircraft kept to their flight schedules. The two hangers were separated by a hallway.

{¶ 6} On January 6, 2004, Housel’s former supervisor approached him during his “lunch break” and requested him to “clean out his tool box.” Hanger 4 contained “over 15” mechanics’ tool boxes; each measured approximately four feet in height and two feet in width and depth. The area in which they stood was “kind of cluttery”; therefore, removing one saved space.

{¶ 7} When he next had the opportunity, Housel went to Hanger 4 to begin the task. The following day, Smallwood encouraged him to “go finish”

²Quoted material is taken from deposition testimony submitted to the trial court.

during Housel's lunch break, because the office "had double coverage on Wednesdays."

{¶ 8} Smallwood told Housel "he would come and get [Housel] when he needed [him]."

{¶ 9} Housel accepted the suggestion. He went to Hanger 4 to finish and used one of the air hoses to clean the dust from the drawers. The air pressure came from the hose at "140 PSI."³ Housel had placed the hose on a table right behind him for easy access, since his movement was constricted by the presence of other tool boxes near his and by the table itself.

{¶ 10} Housel "was bent over at the bottom drawer" when he heard someone approach from the rear. He recognized Smallwood's voice; Smallwood stated, "You have 5 minutes to get this ass back to work," then Housel felt the air hose nozzle "hit [him] in the anus." Housel started to stand and reached back to knock the object away, but Smallwood "resisted"; Housel felt a blast of air enter his rectum as the air hoses's trigger discharged.

{¶ 11} Housel's clothing showed no ill effects from the incident, and he had an initial feeling of only "bloatedness," so he returned to work and made no mention of the prank to anyone but his wife. By the next day, a burning

³Pounds per square inch.

sensation in his lower abdomen manifested itself. Housel attributed the sensation to the unusual activity of transporting his heavy tools.

{¶ 12} Approximately a week later, Housel began bleeding from his rectum; this prompted a visit to a hospital emergency room. The physician failed to remedy the internal bleeding, which persisted. By January 24, 2004, Housel's absences from work for health problems led him to request "short term disability" status from Raytheon.

{¶ 13} In March 2004, a radiologist asked Housel if he had ever suffered any rectal trauma. By May 2004, Raytheon's "Human Resources Generalist," Patricia Kemp, received information that Housel attributed his medical problems to the incident with the air hose; she noted that it led to a "rupture of [his] colon" and internal bleeding.

{¶ 14} The record reflects Housel and his wife instituted an action against Raytheon in October 2005, voluntarily dismissed the action in July 2006, then timely refiled the instant case in June 2007.

{¶ 15} The Housels presented two causes of action, viz., "tortious conduct" on a theory of respondeat superior and employer intentional tort; Clarissa Housel also presented a loss of consortium claim. Raytheon's answer denied the pertinent allegations.

{¶ 16} Raytheon eventually filed a motion for summary judgment with respect to the Housels' claims, arguing that they could support none of the necessary elements of those claims. Raytheon supported its motion with copies of, inter alia, Jay Housel's and Patricia Kemp's deposition testimony.

{¶ 17} The Housels responded with a brief in opposition, relying on the evidence already filed in the action, along with the deposition testimony of Jay Housel's coworker Bryan Bellas. Raytheon filed a reply brief, but supplied no additional evidentiary material.

{¶ 18} The trial court ultimately granted Raytheon's motion for summary judgment without opinion. It is from this order that the Housels appeal, presenting the following assignment of error.

“The trial court erred in granting appellee's motion for summary judgment.”

{¶ 19} The Housels argue that summary judgment in Raytheon's favor was improper. They contend the record contains enough evidence to create genuine issues of material fact with respect to each of their causes of action. This court agrees with the Housels, but only in part.

{¶ 20} Civ.R. 56(C) makes summary judgment appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Norris v. Std. Oil Co.* (1982), 70 Ohio St.2d 1. A properly-

supported motion for summary judgment forces the nonmoving party to produce evidence on any issue for which that party bears the burden of production at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108.

{¶ 21} The evidence must be construed in a light most favorable to the nonmoving

{¶ 22} party. Civ.R. 56(C); *Norris*, supra. Thus, in order to be successful, the evidence so construed must affirmatively demonstrate the opposing party cannot establish the necessary elements of his claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-207. This court's review of the trial court's decision on the motion is de novo. *Taylor v. Orlando Baking Co.*, Cuyahoga App. No. 83054, 2003-Ohio-6165, ¶7.

{¶ 23} In this case, the Housels first alleged Raytheon was responsible for personal injury pursuant to the doctrine of respondeat superior. Under this doctrine, an employer is held liable for the actions of an employee when the employee's actions are "within the scope of his or her employment." *Anderson v. Toeppe* (1996), 116 Ohio App.3d 429, citing *Osborne v. Lyles* (1992), 63 Ohio St.3d 326.

{¶ 24} A "servant's conduct is within the scope of his employment if it is of the kind he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve

the master.” *Id.*, citing *Calhoun v. Middletown Coca-Cola Bottling Co.* (1974), 43 Ohio App.2d 10, 13 (emphasis added). “[W]here the tort [committed] is intentional, *** the behavior giving rise to the tort must be ‘calculated to facilitate or promote the business for which the servant was employed ***.’” *Osborne*, *supra* at 329, citing *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 58.

{¶ 25} Thus, generally, “an intentional and wilful attack committed by an agent or employee, to vent his own spleen or malevolence against the injured person, is a clear departure from his employment and his *** employer is not responsible ***.” *Osborne*, *supra* at 329-330, citing *Vrabel v. Acri* (1952), 156 Ohio St. 467, 474. Nevertheless, “[t]he willful and malicious character of an employee’s act does not always, as a matter of law, remove the act from the scope of employment.” *Id.* at 330 (emphasis added).

{¶ 26} Indeed, whether an employee is acting within the scope of his employment is “commonly” a question of fact. *Id.* The reason is stated by the supreme court as follows: “When an employee diverts from the straight and narrow performance of his task, the diversion is not an abandonment of his responsibility and service to his employer unless his act is so divergent that its very character severs the relationship of employer and employee.” *Id.*, quoting *Wiebold Studio, Inc v. Old World Restorations, Inc.* (1985), 19 Ohio App.3d 246, 250.

{¶ 27} The supreme court in *Osborne* applied the foregoing analysis to a case in which an off-duty police officer “committed various torts upon the appellants.” After determining that the evidence could be construed to demonstrate the officer, even while off-duty, “was assuming control over the scene,” the supreme court held that summary judgment for the officer was improper.

{¶ 28} In this case, Jay Housel testified that he worked with Smallwood in the same office; from his testimony, it can be gleaned that he considered Smallwood, if not technically his supervisor, to occupy a superior position to his own in the company. Housel testified that after his previous supervisor gave him the order to clean out his tool box, Smallwood encouraged him to complete the task and would come to get him if he were needed.

{¶ 29} Housel further testified that when the incident occurred, his “break” nearly was over, and that, as the air hose was placed against his anus, Smallwood stated he had “5 minutes to get this ass back to work.” Construing this evidence in a light most favorable to Housel, it raised a question of fact concerning whether Smallwood’s action was “behavior calculated to facilitate or promote the business for which [he] was employed, or was an independent act committed merely to vent [his] own malice,” for which Raytheon was not

responsible. *Ousman v. Dairy Mart Stores* (Oct. 20, 1994), Cuyahoga App. No. 67237.

{¶ 30} Since conflicting inferences were possible, Raytheon was not entitled to summary judgment on the Housels' cause of action for "tortious conduct" based upon respondeat superior. *Id.*; *Osborne v. Lyles*, *supra*; *Wing v. Anchor Media, Ltd. of Texas*, *supra*; *Thomas v. Ohio Dept. of Rehab. and Corr.* (1988), 48 Ohio App.3d 86; *cf.*, *Byrd v. Faber*, *supra*; *Caldwell v. Fazio* (Feb. 4, 1999), Cuyahoga App. No. 75173.

{¶ 31} With respect to the Housels' other cause of action, however, the trial court acted appropriately in granting summary judgment to Raytheon. "An intentional tort claim against an employer differs [from a respondeat superior claim] because it is an allegation that the employer is liable for its own action or inaction, not the actions of its employee." *Occhionero v. Edmundson* (Mar. 30, 2001), Lake App. No. 99-L-188 (emphasis added). It also requires a higher standard of proof. *Id.* Thus, an intentional tort claim differs from a respondeat superior claim in two important respects.

{¶ 32} In an action by an employee against his employer based upon an intentional tort, the employee must set forth "specific facts" to prove the existence of a genuine issue. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 117. The standard by which an employee must establish an

intentional tort of an employer is set forth in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115.

{¶ 33} In order to establish “intent” for the purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: 1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; 2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and, 3) the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. *Id.*, paragraph one of the syllabus.

{¶ 34} The court further described the requisite standard of proof of the employer's “intent” as “proof beyond that required to prove negligence and beyond that to prove recklessness *** . Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or

condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk -- something short of substantial certainty -- is not intent.” *Id.*, paragraph two of the syllabus.

{¶ 35} In this case, there was no evidence to support a conclusion that Raytheon knew or had reason to know that either Smallwood or any other employee was using an air hose as a method of getting people to return to work, much less that Smallwood himself posed “an unreasonable risk of harm to other employees.” *Id.* See, also, *McGlothin v. LTV Steel Co.* (Oct. 12, 1995), Cuyahoga App. No. 68522; cf., *Occhionero v. Edmunson*, *supra*.

{¶ 36} Housel presented only vague assertions that Smallwood was known to be a poor supervisor. This was inadequate to support a conclusion that Raytheon either knew of Smallwood’s reputation or ratified his behavior. *Burwell v. Pride Cast Metals, Inc.* (July 7, 1993), Hamilton App. No. C-920104.

{¶ 37} Thus, the trial court committed no error in granting summary judgment on the Housels’ cause of action based upon employer intentional tort.

{¶ 38} For the foregoing reasons, the Housels’ assignment of error is sustained in part and overruled in part.

{¶ 39} Summary judgment for Raytheon on the Housels' claim of employer intentional tort is affirmed, but summary judgment for Raytheon on the Housels' claim based upon the doctrine of respondeat superior is reversed.

{¶ 40} This case is remanded for further proceedings consistent with this opinion.

It is ordered that appellants and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, PRESIDING JUDGE

JAMES J. SWEENEY, J., CONCURS

CHRISTINE T. McMONAGLE, J., CONCURS AND DISSENTS
(SEE ATTACHED CONCURRING AND DISSENTING OPINION)

CHRISTINE T. McMONAGLE, J., CONCURRING AND DISSENTING:

{¶ 41} Respectfully, I concur with the majority's decision affirming the trial court's judgment in favor of Raytheon on the Housels' claim of employer intentional tort, but dissent as to the majority's decision that the Housels' "claim

of liability in tort under the doctrine of respondeat superior” should have survived summary judgment.

{¶ 42} Respondeat superior is the “maxim” that “a master is liable in certain cases for the wrongful acts of his servant, and a principle for those of his agent.” Black’s Law Dictionary (5 Ed.1979) 1179. “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* (1991), 57 Ohio St.3d 56, 58, 565 N.E.2d 584. Thus, in order for respondeat superior to apply, there must be an underlying tort upon which the maxim is based, and the claim against the individual employee who caused the tort must be a legally recognizable one. *Krause v. Case W. Res. Univ.* (Dec. 19, 1996), Cuyahoga App. No. 70712 (“Under the doctrine of respondeat superior, without an underlying tort claim against an employee, a plaintiff has no claim against the employee’s employer.”). In other words, if Housel did not have a claim against Smallwood, he did not have one against Raytheon.

{¶ 43} The Housels initiated this action with a three-count complaint. Count One alleged “intentional tortious conduct of Defendants [sic] and their [sic] employees.” The sum and substance of Count Two alleged:

{¶ 44} “On or about January 7, 2004, Defendants Raytheon and [Martin] Smallwood negligently, carelessly and/or recklessly inserted and/or permitted

the insertion of the nozzle of a air hose into the buttocks area of Plaintiff Jay Housel. Immediately thereafter, compressed air was ejected from the hose into Plaintiff's body resulting in the injuries and damages heretofore alleged."

{¶ 45} And Count Three alleged a loss of consortium claim for Clarissa Housel. Significantly, respondeat superior was never even mentioned in the complaint.

{¶ 46} At best, the allegation in Count 2 raises a cause of action of negligence, and would fall under the immunity provision of R.C. 4123.74,⁴ justifying summary judgment.

{¶ 47} Moreover, even if the Housels' second cause of action is liberally construed to have alleged a battery, which is "intentional, unconsented, contact with another,"⁵ the Housels did not demonstrate that a genuine issue of material fact existed as to the allegation under the theory of respondeat superior. As already mentioned, an employer is not ordinarily liable for the intentional torts

⁴That section provides that: "[e]mployers who comply with [the workers' compensation statute] shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval the employer is a self-insuring employer, whether or not such injury, occupational disease, bodily condition, or death is compensable under this chapter."

⁵1 Ohio Jury Instructions (2009), Section 429.03.

of its employee performed outside the scope of his employment. *Byrd*, supra at 58. “There is no presumption that the wrongful act of the agent was the act of the principal; authority to do the act must be demonstrated, or ratification of the act by the principal shown. Where the tort consists of a willful and malicious act, *** it is not generally considered within the scope of the agent’s employment.” *Finley v. Schuett* (1982), 8 Ohio App.3d 38, 39, 455 N.E.2d 132.

{¶ 48} In *Dorsey v. Morris* (1992), 82 Ohio App.3d 176, 611 N.E.2d 509, the Ninth Appellate District affirmed summary judgment in favor of the employer in an action where an injured employee sought recovery from the employer under the doctrine of respondeat superior. In that case, a supervisor threw a sample piece of rubber at the employee after the employee dropped a batch of rubber, causing spillage. The employee contended that the supervisor threw the rubber at him in an attempt to reprimand him for his unsatisfactory work performance. The Ninth District stated:

{¶ 49} “[The supervisor’s] acts unmistakably fall outside of his duties as [the employee’s] supervisor. Supervision involves overseeing, directing, and sometimes disciplining other employees, but it does not include using physical violence to reprimand an employee.” *Id.* at 179.

{¶ 50} The Ninth District not only found that the supervisor’s action fell outside of his duties, it also found that the employer did not ratify his conduct, or

have reason to know that he posed an unreasonable risk of harm to employees. Id. at 179, 180.

{¶ 51} In this case, that Housels contended that Smallwood's action was an attempt to get Jay Housel back to work. In opposition to Raytheon's summary judgment motion, the Housels submitted the deposition testimonies of Raytheon's human resources manager, another Raytheon technician (who worked for the company when the alleged incident occurred), and Jay Housel. Those testimonies collectively established that: (1) no one at Raytheon (management or labor) had knowledge of similar incidences ever occurring before; (2) the company's policies and procedures manual prohibited "horseplay" with the air hoses; (3) the company was not informed of the alleged incident until months after it occurred, and upon learning of the allegation, immediately started an investigation; and (4) as part of the investigation, the company's human resources manager contacted the company's vice president of maintenance operations to inform him of the allegation and advise him that "we can't have that type of behavior. It's unacceptable," and he needed to let "his management staff, as well as all the employees *** know that [that] type of behavior would not be tolerated."⁶

⁶ Smallwood was no longer employed at Raytheon when the company became aware of the alleged incident.

{¶ 52} On this record, the Housels did not demonstrate that Raytheon either authorized or ratified Smallwood's alleged action and, therefore, they failed to "set forth specific facts showing that there is a genuine issue for trial," as required under Civ.R. 56(E). Accordingly, I would wholly affirm the trial court's judgment.