

STATE OF MICHIGAN  
COURT OF APPEALS

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MELINDA CARON,

Plaintiff-Appellant,

v

WALMART STORES, INC.,

Defendant-Appellee,

and

TONY GILBERT,

Defendant.

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UNPUBLISHED

May 31, 2005

No. 254915

Chippewa Circuit Court

LC No. 01-005654-NO

Before: Murray, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant Wal-Mart Stores, Inc. (Wal-Mart) under MCR 2.116(C)(10). We affirm.

Plaintiff had a friend take nude photographs of her and then brought the roll of film to a Wal-Mart photo department to have it developed. After plaintiff became aware that other individuals had apparently seen nude photographs of her, she filed a complaint against Wal-Mart and Tony Gilbert (Gilbert), alleging that Gilbert made unauthorized reproductions of plaintiff's photographs while he was employed by Wal-Mart in its photo department. Plaintiff's complaint alleged invasion of privacy, intentional infliction of emotional distress, violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, and negligent supervision. Defendant moved for summary disposition, and the trial court granted the motion under MCR 2.116(C)(10).

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* A trial court may grant summary disposition under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Greene v A P Products, Ltd*, 264 Mich App 391, 398; 691 NW2d 38 (2004). In ruling on a motion under MCR 2.116(C)(10), the trial court must view the pleadings, affidavits and other documentary evidence in a light most favorable to the nonmoving party. *Id.*

Plaintiff first argues that Wal-Mart is liable for Gilbert's unauthorized reproduction of her photos under the doctrine of respondeat superior. We disagree.

“[A] master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment.” *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002), quoting *Murphy v Kuhartz*, 244 Mich 54, 56; 221 NW 143 (1928). However, “[a]n employer is not vicariously liable for acts committed by its employees outside the scope of employment, because the employee is not acting for the employer or under the employer’s control.” *Id.* Even where an employee is working, “there is no liability on the part of an employer for torts intentionally or recklessly committed by an employee beyond the scope of his master’s business.” *Id.*, quoting *Bradley v Stevens*, 329 Mich 556, 562; 46 NW2d 382 (1951). An employer is not liable for his employee’s tortious act if the employee acts outside his employment to accomplish a purpose of his own. *Martin v Jones*, 302 Mich 355, 358; 4 NW2d 686 (1942). As a general rule, the trier of fact determines whether an employee was acting within the scope of his employment; however, summary disposition is appropriate if it is apparent that the employee was acting to accomplish a purpose of his own. *Green v Shell Oil Co*, 181 Mich App 439, 447; 450 NW2d 50 (1989).

Here, although Gilbert was working at the time that he made the unauthorized copies of plaintiff’s photos, it is clear that he did so for his own purpose. Gilbert was not furthering Wal-Mart’s business interests or benefiting Wal-Mart by making the unauthorized copies of plaintiff’s photos. Rather, he was acting for his own benefit. Therefore, because Gilbert’s unauthorized reproduction of plaintiff’s photos “could only be construed as an attempt to accomplish his own purpose, not to further his employer’s business interests,” Wal-Mart should not be held vicariously liable for Gilbert’s tortious acts. *Id.* The trial court therefore properly granted defendant’s motion for summary disposition of plaintiff’s vicarious liability claim under the doctrine of respondeat superior.

Plaintiff next argues that even if Gilbert was not acting within the scope of his employment when he made the unauthorized copies of plaintiff’s photos, Wal-Mart is still vicariously liable to plaintiff for Gilbert’s actions under Restatement Agency, 2d, § 219(d), p 481. Plaintiff asserts two separate theories of liability under the Restatement. First, plaintiff asserts that Wal-Mart is liable to her under an apparent authority theory because it cloaked Gilbert with apparent authority or held him out to third parties as possessing sufficient authority to commit the particular act in question and there was reliance on that apparent authority by plaintiff. Second, plaintiff contends that Wal-Mart is liable to plaintiff because Gilbert was aided in accomplishing the tort by the existence of the agency relationship because without Wal-Mart’s equipment and training, Gilbert would not have been able to commit this tort. We will address these theories in turn.

Restatement Agency, 2d, § 219(2)(d), p 481, states as follows:

§ 219. When Master Is Liable For Torts Of His Servants

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(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

\* \* \*

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

In support of her apparent authority theory, plaintiff relies solely upon the Sixth Circuit's opinion in *Jones v Federated Financial Reserve Corp*, 144 F3d 961 (CA 6, 1998). We reject plaintiff's reliance on *Jones* for two reasons. First, *Jones* is not binding authority in this Court. *Abela v General Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). Second, *Jones* does not support plaintiff's contention because in *Jones* the apparent authority theory only applies if there was reliance by a third party, and, in the instant case, there was no reliance by a third party. In *Jones*, the Sixth Circuit stated:

Under an apparent authority theory, vicarious "liability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of business provided to him." [*Jones, supra* at 965, quoting *American Society of Mechanical Eng'rs, Inc v Hydrolevel Corp*, 456 US 556, 566; 102 S Ct 1935; 72 L Ed 2d 330 (1982).]

In this case, Wal-Mart did not grant Gilbert the authority to make copies of plaintiff's photos without her permission. Moreover, while plaintiff asserts that she relied to her detriment on the fact that Wal-Mart would keep her photos safe, an apparent authority theory requires reliance by a third person, and such reliance is not present in this case. Therefore, we conclude that Wal-Mart is not liable to plaintiff for Gilbert's actions under an apparent authority theory.

We also reject plaintiff's theory that Gilbert was "aided in accomplishing the tort." Plaintiff's argument assumes that Michigan has adopted the "aided in accomplishing the tort" exception set forth in Restatement Agency, 2d, § 219(d), p 481, and this Court has noted that it is unclear whether Michigan has adopted this exception, particularly for cases involving tort actions. See *Salinas v Genesys Health System*, 263 Mich App 315, 320; 688 NW2d 112 (2004). Moreover, even if Michigan did recognize such an exception, it would not apply to the facts of this case because the relationship here merely provided Gilbert with the opportunity to commit the tort, and the "mere fact that an employee's employment situation may offer an opportunity for tortious activity" does not mean that he "was aided in accomplishing the tort by the existence of the agency relation" for purposes of the Restatement exception. *Id.* at 321, quoting *Bozarth v Harper Creek Bd of Ed*, 94 Mich App 351, 354-355; 288 NW2d 424 (1979). For the Restatement exception to apply, there must be something more than mere opportunity—the agency itself must empower the employee to commit the tortious conduct. *Id.* at 323.

In this case, Wal-Mart did not empower or authorize Gilbert to make copies of plaintiff's photos. To the contrary, Wal-Mart had an established policy forbidding its employees to reproduce customers' photos and stating that the photos are at all times the property of the customer. Further, Wal-Mart did not vest any authority in Gilbert to give him the power to accomplish the tort of reproducing plaintiff's photos without her permission. Rather, Wal-Mart merely provided Gilbert with the opportunity to reproduce plaintiff's photographs. Therefore,

even if the “aided in accomplishing the tort” Restatement exception was recognized in Michigan, it would not be applicable to this case.

Plaintiff next argues that Wal-Mart is directly liable to her because it failed to properly supervise and train its employees or safeguard its customers’ photos. Again, we disagree. To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant’s breach of duty proximately caused the plaintiff’s injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). According to plaintiff, Wal-Mart was negligent in its supervision of Gilbert because, although it had a policy in place prohibiting unauthorized reproduction of customers’ photos, it failed to properly train, supervise, or enforce its policy in order to safeguard plaintiff’s photos from Gilbert.

Plaintiff has failed to establish that Wal-Mart owed her a duty to supervise Gilbert in this regard because Wal-Mart did not know, or have reason to know, of Gilbert’s alleged propensity to make unauthorized reproductions of plaintiff’s photos. See, e.g., *Bradley, supra* at 562-563; *Tyus v Booth*, 64 Mich App 88, 90-91; 235 NW2d 69 (1975). There is nothing in the record to show that Wal-Mart either knew or should have known that Gilbert would make unauthorized copies of plaintiff’s photos. Plaintiff asserts that the existence of Wal-Mart’s policy prohibiting employees from reproducing customers’ photos is evidence that Wal-Mart was on notice of the potential for such conduct by its employees; however, the mere existence of such a policy is not sufficient to show that Wal-Mart knew or should have known that Gilbert or any particular employee would make unauthorized copies of a customer’s photos. Indeed, if we were to agree with plaintiff’s argument, then we would effectively be punishing Wal-Mart for taking any precautions to safeguard its customers because doing so would subject it to liability when employees violated its policies.

Further, we find nothing in the record to indicate that Wal-Mart failed to supervise or train its employees or enforce its policy against unauthorized reproductions of customers’ photos. While Gilbert stated in his responses to plaintiff’s request for admissions that nobody ever told him that he could not copy photos, that he was never supervised to make sure he did not keep any unauthorized photos, and that it was common knowledge that employees had the ability to make unauthorized copies of photos, he also testified that he was aware of a document that stated that photos were the customers’ property and that he recalled that others within the department that wanted to reproduce a customers’ photos would ask the customer for permission. Further, the former manager of the photo department testified that Wal-Mart had procedures to prevent unauthorized copies of photos and that each of the workers within the photo department policed each other to make sure that this did not occur. She also testified that there were always two workers on duty except when they were closing, so there would only be an hour at most that Gilbert would be left alone in the photo department. She explained that Gilbert would have been told in his initial training that taking customers’ photos without permission is wrong, and she further stated that discipline for taking customers’ photos could involve coaching, a write up, or even termination. Given this testimony, it is clear that Wal-Mart does have a policy in place and that it trains, supervises, and enforces its policy to protect its customers. Therefore, we conclude that the trial court properly granted Wal-Mart’s motion for summary disposition of plaintiff’s negligent supervision claim.

Plaintiff next argues that the trial court erred in granting Wal-Mart's motion for summary disposition of her MCPA claim. Plaintiff's arguments that Wal-Mart violated MCL 445.903(1)(e) and (1)(y) were not raised in plaintiff's complaint or in her response to Wal-Mart's motion for summary disposition. Because plaintiff has raised these arguments for the first time on appeal, they are not properly before this Court and we decline to address them. *Lansing Mayor v Public Service Comm*, 257 Mich App 1, 19; 666 NW2d 298 (2003).

Plaintiff finally argues that the trial court erred in denying her motion for reconsideration. We disagree.

We review the trial court's decision regarding denial of a motion for rehearing or reconsideration for an abuse of discretion. *Ensink v Mecosta Co General Hosp*, 262 Mich App 518, 540; 687 NW2d 143 (2004). The moving party "'must show that the trial court made a palpable error and that a different disposition would result from correction of the error.'" *Ensink, supra* at 82, quoting *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 82; 669 NW2d 862 (2003); MCR 2.119(F)(3).

Plaintiff contends that the trial court committed palpable error that if corrected would result in a different disposition. Specifically, plaintiff asserts that the trial court failed to consider plaintiff's apparent authority theory for purposes of establishing Wal-Mart's vicarious liability and that the trial court failed to consider the admissions made by Gilbert, which indicate that Wal-Mart failed to supervise him and that Wal-Mart knew of the problem of unauthorized copying of customers' photos and failed to warn its customers. However, as previously discussed, an apparent authority theory is not applicable to the facts of this case. Therefore, the trial court's consideration of the apparent authority theory would not have resulted in a different disposition of plaintiff's claim for vicarious liability. The same is true of Gilbert's responses to plaintiff's requests for admissions. Consideration of the admissions would not result in a different disposition of the claim for negligent supervision because they do not show that Wal-Mart knew or should have known that Gilbert would make the unauthorized copies of plaintiff's photos. Therefore, the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration.

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Pat M. Donofrio