

[Cite as *Amato v. Heinika Ltd.*, 2005-Ohio-189.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 84479

RICHARD AMATO, :
 :
 Plaintiff-Appellant : JOURNAL ENTRY
 : and
 vs. : OPINION
 :
 HEINIKA LIMITED, DBA, :
 PANINI'S ON COVENTRY, :
 :
 Defendant-Appellee :

DATE OF ANNOUNCEMENT :
 OF DECISION : JANUARY 20, 2005

CHARACTER OF PROCEEDING : Civil appeal from
 : Common Pleas Court
 : Case No. 484863

JUDGMENT : AFFIRMED.

DATE OF JOURNALIZATION :

APPEARANCES:

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JAMES D. SWEENEY, J.*:

{¶ 1} Plaintiff Richard Amato brought suit against Heinika Limited, the owners of a Panini's restaurant, alleging that one of their employees, Eliacan Perez, struck him without provocation. The complaint alleged Heinika's liability on the basis of respondeat superior in that Heinika ratified Perez's assault by failing to terminate him immediately. At the close of Amato's case, the court directed a verdict in Heinika's favor on grounds that Amato presented no evidence to show a critical element of a respondeat superior claim - that Heinika received a benefit from Perez's assault. Amato appeals.

I

{¶ 2} We review directed verdicts in the same way we review summary judgments: a motion for a directed verdict is to be granted when, after construing the evidence most strongly in favor of the party opposing the motion, the court could find that reasonable minds could come to only one conclusion and that conclusion is

adverse to the party opposing the motion. See Civ.R. 50(A)(4); *The Limited Stores, Inc. v. Pan American World Airways, Inc.* (1992), 65 Ohio St.3d 66.

{¶ 3} Amato premised his claims of respondeat superior on Heinika's ratification of Perez's actions. He presented evidence which, construed in a light most favorable to him, showed that Heinika did not immediately terminate Perez, choosing instead to conduct an investigation into Perez's conduct. When Heinika did terminate Perez, it did so due to his tardiness, not because of the assault. Amato argues that Heinika's retention of Perez constituted a ratification of Perez's assault.

{¶ 4} The doctrine of respondeat superior imposes liability upon an employer for the acts done by an employee in the course and scope of employment. The theory behind liability is that the employee's acts are imputed to the employer because the employee acting within the course and scope of employment, is assumed to do only those acts which benefit the employer. Conversely, when an employee commits an intentional tort, it is assumed that the employee did not act within the course and scope of employment, for intentional torts generally encompass bad acts which have no place in the employment relation. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 58.

{¶ 5} The exception to liability for intentional torts occurs when the employer ratifies the employee's act, in essence adopting it as the employer's own. Because the assumption against

intentional torts weighs against liability, the courts have generally required that acts of ratification be explicit. Hence, the law has long rejected the notion of ratification by silence. In *Lanning v. Brown* (1911), 84 Ohio St. 385, 392, the supreme court stated, "[i]t seems to be the law that to confirm or ratify, one must have knowledge of the matter or transaction to be confirmed or ratified, and that silence or even acquiescence does not amount to such ratification."

{¶ 6} Nevertheless, the current view is that silence can sometimes express intent as loudly as words. There are situations where one would expect a principal to act, and thus the failure to act can be viewed as a manifestation of intent to ratify the agent's act. See, generally, Tiersma, *The Language of Silence* (1995), 48 Rutgers L.Rev. 1. In *Campbell v. Hospitality Motor Inns, Inc.* (1986), 24 Ohio St.3d 54, 58, the supreme court considered whether a corporation could be bound on a contract that it did not expressly authorize or ratify. After discussing general principles of agency law relating to ratification, the court ruled that the appellant's evidence "could be viewed as demonstrating corporate ratification by silence ***." In making this statement, the supreme court did not cite to *Lanning* or any of its other prior decisions which held that one cannot ratify an act of an agent by silence.

{¶ 7} The statement in *Campbell* is consistent with the current state of the law. The Restatement of the Law 2d Agency (1958),

Section 94 states, "[a]n affirmance of an authorized transaction can be inferred from a failure to repudiate it." In *Brooks v. Bell*, Hamilton App. No. C-970548, the court of appeals stated:

{¶ 8} "In a syllabus paragraph of *Morr v. Crouch* [(1969), 19 Ohio St.2d 24], the Ohio Supreme Court stated that 'negligence or inaction alone is insufficient to show ratification of an agent's unauthorized act, but ratification must follow knowledge of the facts.' We interpret this syllabus paragraph to mean that inaction or silence alone is not enough to prove ratification of an agent's unauthorized action, but that ratification can be shown by inaction or silence where the principal is fully informed of all of the material facts to the agent's action. If a principal is fully aware of the agent's unauthorized act and either takes a position inconsistent with non-affirmance or retains the benefits of the act, the principal has ratified the act. When a principal has full knowledge of the material facts of an agent's unauthorized act, silence may constitute ratification if a reasonable person could be expected to speak out against the unauthorized act. This interpretation is consistent with Ohio case law, case law from many other jurisdictions, and hornbook agency law." (Footnotes and citations omitted.)

{¶ 9} In line with this precedent, Amato argues that Heinika silently ratified Perez's assault. He claims that he presented evidence to show that Heinika investigated the assault, determined

that Perez acted improperly, yet failed to terminate him, thus creating a triable issue on ratification of the assault.

{¶ 10} The difficulty with Amato's argument is that he failed to show that the assault occurred in the course and scope of employment. In *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 278, the supreme court stated that "the act of an agent is the act of the principal within the course of the employment when the act 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." This view is consistent with Section 228 of the Restatement of Agency 2d, which states that the conduct of an employee is within the "scope of employment" when:

{¶ 11} "(a) it is of the kind he is employed to perform;

{¶ 12} "(b) it occurs substantially within the authorized time and space limits; [and]

{¶ 13} "(c) it is actuated, at least in part, by a purpose to serve the master."

{¶ 14} Under the Restatement definition of "course of employment," we see no facts presented at trial that would show that Perez committed the assault in the course and scope of employment. Certainly, striking a patron was not an act of the kind he was employed to perform and it was not actuated by a purpose to serve Heinika. Indeed, the touchstone of any ratification argument in the context of respondeat superior is

whether the employer derived a benefit from the employee's actions.

Bryd v. Faber, 57 Ohio St.3d at 59. When an employee strikes patrons, there is no obvious benefit to the principal, for it is an action "to vent his own spleen or malevolence against the injured person, [and] is a clear departure from his employment and his principal or employer is not responsible therefor." *Vrabel v. Acri* (1952), 156 Ohio St. 467, 474.

{¶ 15} In addition, Heinika's failure to terminate Perez for the assault is not a ratification of the assault. Comment d to Restatement of Agency 2d, Section 94, is particularly applicable to this case:

{¶ 16} "*Failure to discharge servant*. If a servant commits an act in the scope of employment which is of such a nature that a jury can properly award punitive damages against the servant, it can award punitive damages against the master if he manifests approval of the act. *However, mere retention of the servant in the employment is not of itself a sufficient manifestation of approval.*

***"

{¶ 17} Amato's case for ratification rested entirely on Heinika's failure to terminate Perez, since there was no question that Heinika did not approve of the assault. Under the Restatement view, Heinika's retention of Perez, standing alone, could not manifest ratification. Indeed, a Heinika representative testified that it did not terminate Perez because it wished to investigate

the incident, and even then approached the termination with some trepidation because it feared legal repercussions from Perez.

{¶ 18} But evidence that an employer feared legal repercussions from a termination of employment is not evidence showing an intent to ratify Perez's assault. There being no evidence of ratification, it follows that the court did not err by directing a verdict in Heinika's favor.

II

{¶ 19} Amato also argues that the court should not have directed a verdict against Adam Hustek, another Heinika employee who witnessed the assault but failed to summon a manager to diffuse the situation.

{¶ 20} We find no error. Amato did not file a cause of action on this theory of liability, and the complaint contains no mention whatsoever of Hustek's name. Amato maintains that his "cause of action" went forward with the implied consent of the parties under Civ.R. 15(B), but he failed to present the theory in a way that would permit us to conclude that it went forward at trial. In *State ex rel. Evans v. Bainbridge Twp. Trustees* (1983), 5 Ohio St.3d 41, the syllabus states:

{¶ 21} "1. An implied amendment of the pleadings under Civ. R. 15(B) will not be permitted where it results in substantial prejudice to a party. Various factors to be considered in determining whether the parties impliedly consented to litigate an issue include: whether they recognized that an unpleaded issue

entered the case; whether the opposing party had a fair opportunity to address the tendered issue or would offer additional evidence if the case were to be tried on a different theory; and, whether the witnesses were subjected to extensive cross-examination on the issue.

{¶ 22} "2. Under Civ. R. 15(B), implied consent is not established merely because evidence bearing directly on an unpleaded issue was introduced without objection; it must appear that the parties understood the evidence was aimed at the unpleaded issue.

{¶ 23} "3. Whether an unpleaded issue is tried by implied consent is to be determined by the trial court, whose finding will not be disturbed, absent showing of an abuse of discretion."

{¶ 24} It was not until the end of trial that Amato even ventured to suggest that he had a theory of liability based on Hustek's actions. During his opening statement, Amato's attorney told the jury that the theories of liability were Heinika's failure to supervise and intervene to prevent Perez's rage and that it took no action "against their own employee who assaulted this patron." At no point was there any mention of Hustek and his conduct as a basis for recovery under respondeat superior. In fact, the first time that Hustek was mentioned as a basis for recovery came during Heinika's motion for a directed verdict, when it suggested that "the best they got is a punch by Mr. Perez *** and the fact that maybe Mr. Hustek should have gotten an employee involved." Heinika

aptly pointed out to the court that Amato failed to call Hustek as a witness during its case-in-chief, so there was no evidence to support any claim relating to Hustek.

{¶ 25} Given this posture, Amato's arguments relating to Hustek's smack of opportunism. While Amato may have tried to push this theory of liability forward through his witnesses, he did not present evidence of this claim in a way that would permit us to conclude that Heinika understood that it was a triable issue. There was no forethought given to this theory, the jury remained uninformed throughout, and it took defense counsel, in a preemptive argument, to raise it first to the court. This being the case, we fail to see how Heinika would have understood that respondeat superior based on Hustek's conduct would be tried by its implied consent.

{¶ 26} At any rate, even had the issue been properly joined, the court would not have erred by directing a verdict on the claim relating to Hustek because the legal duty that Amato claimed to have been owed arose from an employee handbook that Heinika did not distribute to its employees. The evidence showed that Heinika prepared, but did not distribute to its employees an employee handbook that instructed employees to summon a manager in the event of trouble with patrons. The evidence clearly showed that Hustek did not receive this handbook, so he could have been under no duty to take the action that Amato suggests. Any claim based on Hustek's failure to act would have failed as a matter of law.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas 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.

JAMES D. SWEENEY*
JUDGE

JAMES J. SWEENEY, P.J., CONCURS.

DIANE KARPINSKI, J., CONCURS IN
JUDGMENT ONLY.

(*SITTING BY ASSIGNMENT: Judge James D. Sweeney, Retired, of the Eighth District Court of Appeals.)

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) 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(E) 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(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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