Reversed and Remanded and Opinion filed August 24, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00715-CV

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EDNA N. PATIN, Appellant

V.

ROBERT F. CARVER, PHELPS-TOINTON d/b/a SOUTHERN STEEL COMPANY, and HENSEL PHELPS CONSTRUCTION CO. d/ba/ SOUTHERN STEEL, Appellee

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On Appeal from the 164th District Court
Harris County, Texas
Trial Court Cause No. 98-06281A

O P I N I O N

This suit arises out of an assault of Edna Patin by Robert Carver. Ms. Patin sued both Carver and his employer, Southern Steel. The trial court granted Southern Steel's motion for summary judgment on the theory that Carver's conduct was not in the course and scope of his employment. Patin contends there is factual issue regarding whether Carver was in the course and scope of his employment. We agree.

Robert Carver was flying on an American Airlines flight to Colorado on behalf of his employer, Southern Steel, when his plane was unexpectedly diverted from Dallas to Houston due to bad weather. Carver received instructions from American Airline representatives regarding the procedures he would need to follow to transfer to a Delta Airlines flight. Carver proceeded to the Delta terminal, but became angry when a Delta representative told him he would have to follow a different procedure than the one described by American Airlines. Carver lost his temper and began shouting obscenities. In a fit of rage, he then hurled his briefcase at a nearby wall. Edna Patin, a Delta flight attendant who was reporting to work was accidentally struck in the face by the briefcase. The police were called, and Carver was subsequently charged with assault.

Patin, who had no previous health problems, now suffers chronic cheek and neck pain along with frequent headaches. Carver, who had been arrested on at least two previous occasions for assault, was sued by Patin for negligence and gross negligence. She also sued Carver's employer, Southern Steel, contending that Carver was in the course and scope of his employment at the time of the accident.

Southern Steel filed a motion for summary judgment contending, as a matter of law, that Carver's assault of Patin was outside the course and scope of his employment. The trial court granted Southern Steel's motion for summary judgment, and Patin appealed. Southern Steel, in turn, filed a motion to dismiss the appeal for Patin's failure to file a timely notice of appeal.

Motion to Dismiss

Southern Steel is the assumed name of a business allegedly composed of two separate entities – Phelps-Tointon and Hensel Phelps Construction Company. Phelps-Tointon and Hensel Phelps filed a joint motion for summary judgment on behalf of Southern Steel. On March 25, 1999, the trial court granted the motion for summary judgment. The order further directed that "any and all other relief requested but not granted herein is hereby expressly denied."

On March 31, 1999, Patin moved to "sever the defendant Phelps-Tointon dba Southern Steel Company out of this case and create a new cause entitled *Edna Patin v. Robert Carver*." No mention was made of the other entity, Hensel Phelps.

On May 24, 1999, Patin also filed a motion seeking (1) a new trial, or (2) in the alternative, summary judgment against Carver. Patin conceded in her motion that except in rare instances, an intentional assault is outside the course and scope of a person's employment. Patin argued, however, that the uncontroverted summary judgment proof demonstrated that Carver's assault was negligent, not intentional. Thus, she claimed the trial court erred in granting summary judgment to Southern Steel. In the alternative, Patin asserted that if Carver's assault was a criminal act, i.e., perpetrated with criminal recklessness, she was entitled to summary judgment against Carver.

On May 24, 1999, the trial court severed Phelps-Tointon from the original cause (No. 98-06281) and assigned the severed action a new cause number (No. 98-06281A). The court also denied Patin's motion for new trial and/or motion for summary judgment. Fearing the "Mother Hubbard" clause in the trial court's order granting Southern's motion for summary judgment might have disposed of her claims against Carver, Patin filed two notices of appeal: (1) on June 17, 1999, Patin filed notice of appeal in the 98-06281; and (2) on July 21, 1999, Patin filed an additional notice of appeal in 98-06281A.

To be a final, appealable summary judgment, the order granting the motion must dispose of all parties and all issues before the court. *See Mafrige v. Ross*, 866 S.W.2d 590, 591 (Tex.1993). If the order does not dispose of all issues and all parties, and it is not severed, it is interlocutory and therefore not appealable. *See id.* If a summary judgment order appears to be final, however, as evidenced by language purporting to dispose of all claims or parties (e.g., a "Mother Hubbard" clause), the judgment should be regarded as final for purposes of appeal. *See id.* at 592. Under Mafrige, we may look only to the four corners of the summary judgment order to determine finality. *See id.; Lehmann v. Har-Con Corp.*, 988 S.W.2d 415, 417 (Tex. App.–Houston [14th Dist.] 1999, no pet.).

Here, there is a "Mother Hubbard" clause, which would seem to make the judgment final. However, the express terms of the document itself limit the relief granted to the defendants Phelps-Tointon and Hensel Phelps. *See Huffine v. Tomball Hosp. Authority*, 983 S.W.2d 300, 301 (Tex. App.–Houston[14 Dist.] 1997, no pet.) (holding that *Mafrige* does not extend to judgments where there are multiple defendants and there is language limiting the "take-nothing" phrase to one defendant).[1] The *Mafrige* rule is intended to be "practical in application and effect." *Mafrige* at 592. "[L]itigants should be able to recognize a judgment which on its face purports to be final." *Id.* In the instant case, the summary judgment, which names three defendants and expressly limits relief to two of them, is interlocutory on its face.

The judgment as to Phelps-Tointon became final when it was severed from the larger case. *See Martinez v. Humble Sand & Gravel, Inc.*, 875 S.W.2d 311, 313 (Tex. 1994). Thus, the appellate timetable began running in the severed cause at that time. *Id*. From the date of the severance, May 24, 1999, Ms. Patin had 90 days in which to file a notice of appeal. *See* TEX. R. APP. P. 26.1 (a)(1) (giving a 90 day window to file an appeal if a motion for new trial was timely filed); TEX. R. CIV. P. 329b (a) (saying a motion for new trial may be filed "prior to" the judgment). Ms. Patin filed her notice of appeal on July 21, 1999. This was within the appellate window. Ms. Patin's appeal was timely filed as to cause number 98-06281A, the severed action against Phelps-Tointon. Thus, because this Court has proper jurisdiction over the appeal involving Phelps-Tointon, appellee's motion to dismiss is overruled.[2]

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[1] *Lehmann*, which also involved multiple defendants, came to the opposite conclusion. *See Lehmann*, 988 S.W.2d at 417. In that case, however, there is no indication that the language limiting relief to only some defendants was in the order itself, as opposed to the wider appellate record.

[2] To the extent appellant has appealed from cause number 98-06281, such appeal, if any, is dismissed for want of jurisdiction because the summary judgment remains interlocutory as to the remaining defendants, Hensel Phelps and Carver.

Course and Scope of Employment

Phelps-Tointon moved for summary judgment solely on the ground that Carver was not acting in the course and scope of his employment and thus it could not be held liable for his actions. Summary judgment is proper when a movant establishes there is no genuine issue of material fact, and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex.1995); *Bangert v. Baylor College of Med.*, 881 S.W.2d 564, 566 (Tex. App.–Houston [1st Dist.] 1994, writ denied). Defendants are entitled to summary judgment if they establish that no genuine issue of material fact exists regarding an essential element of the plaintiff's claim. However, we will make every reasonable inference in favor of the nonmovant and resolve any doubts in her favor. *Randall's Food Mkts., Inc.*, 891 S.W.2d at 644; *Bangert*, 881 S.W.2d at 565-66. If the movant establishes a right to summary judgment, the non-movant must produce summary judgment proof showing the existence of an issue of material fact to preclude summary judgement. *See Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 907 (Tex. 1982); *Cummings v. HCA Health Servs. of Texas*, 799 S.W.2d 403, 405 (Tex. App.–Houston [14th Dist.] 1990, no writ).

Phelps-Tointin contends that, if every reasonable inference is indulged and all doubts are resolved in favor of Ms. Patin, she still failed to prove that Carver was acting in the course and scope of his employment. Generally, an employer is vicariously liable for the torts of its servants only if those torts were committed in the course and scope of employment. *See GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 617-18 (Tex. 1999); *Medina v. Herrera*, 927 S.W.2d 597, 601 (Tex.1996); RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958). To show that a party acted within the course and scope of his employment, a plaintiff need not show the negligent act was expressly authorized by the employer. *Mata v. Andrews Transport, Inc.*, 900 S.W.2d 363, 366(Tex. App.–Houston[14 Dist.] 1995, no pet.). Instead, the plaintiff need only show that the act was: (1) within the general authority given him; (2)

in furtherance of the employer's business; and (3) for the accomplishment of the object for which the employee was employed. *Id*.

A physical assault is normally an expression of personal animosity. *See Peek v. Equipment Services, Inc.*, 906 S.W.2d 529, 532 (Tex. App.–San Antonio 1995, no pet.). Further, an employer is not liable for actions that an employee takes in his own interests and not to further the purpose of carrying out the master's business. *See Viking v. Circle K Convenience Stores, Inc.*, 742 S.W.2d 732, 734 (Tex. App.–Houston [1st Dist.] 1987, writ denied). Here, however, the summary judgment proof shows Carver had no personal animosity toward Patin. In fact, the undisputed proof shows Carver did not intend to hit Patin, did not have any conversation with her, and was unaware that she was passing nearby when he slung his briefcase at the wall.

Where an employee commits an assault, and the assault is so connected with and immediately grows out of another act of the employee, imputable to the employer, it is for the trier of fact to determine whether the employee ceased to act as an employee and acted instead upon his own responsibility. *See Durand v. Moore*, 879 S.W.2d 196, 199 (Tex. App.–Houston [14th Dist.] 1994, no writ). The only purpose disclosed by the summary judgment proof for Carver's trip to Colorado was to further the interests of Southern Steel. When his flight was redirected to Houston, Carver's frustration was directly related to that mission, i.e., to arrive in Colorado expeditiously. His anger, while certainly not conducive to good public relations, was conceivably related to a business, rather than a personal, purpose. Presumably, Carver hoped to impress upon the Delta representatives the need to speedily resolve his travel difficulties. Thus, we find this assault was so closely connected with the performance of Carver's duties as to prevent the conclusion as a matter of law that when he struck Patin he had ceased to act as the company's agent and had begun to act upon his own responsibility. *See Houston Transit Co. v. Felder*, 208 S.W.2d 880, 881 (Tex. 1948).

The judgment of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed August 24, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).