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Frank M. Wells et al v. Walker Bank & Trust Co. : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK M. WELLS, Assignee,
Statutory Assignment for the
Benefit of Creditors of Financial
Service Company, Inc.,

Plaintiff,

vs.

WALKER BANK & TRUST COMPANY,
a Utah corporation; and FRIST
SECURITY BANK OF UTAH, a National
Association,

Defendants and Appellant,

Case No. 15750

WALKER BANK & TRUST COMPANY,
a Utah banking corporation,

Third-Party Plaintiff
and Appellant,

vs.

GOLDEN STETTLER, an individual,
LYNN TOOLSON, an individual,
ALMA DITTMER, an individual,
H. M. NIELSON, an individual,
and ELMER GIBSON, an individual,

Third-Party Defendants
and Respondents.

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Clerk, Supreme Court, Utah

RESPONDENTS' BRIEF

Appeal from an Order of the First Judicial District
Court in and for Cache County, Utah, Honorable
J. Duffy Palmer, Judge

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RESPONDENTS' BRIEF

NATURE OF THE CASE

To the statement in the Appellant's Brief, Respondents add that neither the Plaintiff nor the Third-Party Plaintiff has seen fit to add Elmer G. Erickson as a Party Defendant, even though all of the allegations of the Complaint and the Third-Party Complaint complain of acts by Elmer G. Erickson.

STATEMENT OF FACTS

Since no evidence was taken, the "Statement of Facts" can be nothing more than references to the pleadings. Appellant's Statement of facts differs from the pleadings wherein it states: "While so employed and in the scope of his employment, Elmer G. Erickson perpetrated those acts..." (Brief p. 4). There is no allegation in the pleadings that in doing the acts complained of, Elmer G. Erickson was acting within the scope and authority of his employment. The only reference is in Paragraph (21) of the Third-Party Complaint which states: "Those actions being done while Elmer G. Erickson was an agent or servant of Third-Party Defendants in the course of his work as an agent or servant..." (R. 45)

It should be noted also, that there is no allegation that Respondents had any prior knowledge of any criminal tendencies or conduct of Elmer G. Erickson, but only the general allegation that Respondents were "negligent in hiring" Elmer G. Erickson.

STATEMENT OF POINTS

I

A PRINCIPAL OR MASTER IS NOT LIABLE FOR THE FORGERY,
ALTERATION OR COMPLETION OF CHECKS BY AN AGENT OR EMPLOYEE.

Appellants have not mentioned, nor have they cited any authority for the real issue in this action; i.e., whether a principal or master is liable for an agent or servant's forgery, alteration or wrongful completion of checks.

"A principal will not be liable, ordinarily, for the agent's forgeries or unauthorized alterations or completions of instruments... This is based on the very obvious principle that any unauthorized change in a material respect destroys the integrity of the instrument as the contract which the maker has executed. It ceases to be his contract and is avoided, even the hands of an innocent holder for value." 3 Am. Jur. 2d 630,631. Walsh vs. Hunt, 120 Cal. 46; 52 Pac. 115.

An alteration of an instrument by an agent of a party thereto or of one claiming thereunder is in legal effect, the act of the principal if such alteration is within the express or implied authority of the agent; otherwise it is to be regarded as the act of a stranger, constituting a mere spoliation unless subsequently ratified. 4 Am. Jur. 2d 16.

There is no allegation in the Complaint or the Third-Party Complaint that any forgeries, alterations or completions of instruments committed by Elmer G. Erickson were done with express or implied from the principal. On the contrary, all of the acts are treated as without authority and wrongful.

Further, it is clear that an employer may not be held liable for the criminal acts of an employee on the theory that the employer ought to have foreseen or anticipated that the employee would commit the criminal act and provided against the possibility of its commission. Belmar Inc. vs. Dixie Building Maintenance, Inc., 226 So. 2d 280, 53 Am. Jur. 2d 463.

II

A PRINCIPAL OR MASTER IS LIABLE FOR THE TORT OF AN AGENT OR EMPLOYEE ONLY WHEN THE TORT IS PERFORMED WITHIN THE SCOPE OF THE AGENT'S AUTHORITY AND EMPLOYMENT AND WITH INTENT TO FURTHER THE EMPLOYER'S BUSINESS.

The well-settled rule is that a principal is liable civilly for the tortious acts of his agent which are done within the course and scope of the agent's employment.

No person dealing with an agent may hold the principal liable for any act or transaction of the agent not within the scope of his real or apparent authority. For all such unauthorized acts, the agent, and he alone, may be held liable.

3 Am. Jur. 2d 628. Kasner vs. Gage 281 Minn. 149, 161 N.W. 2d 40.

The foregoing is especially significant since all of the allegations of the Complaint in the instant action characterize Elmer G. Erickson's acts as "unauthorized acts" and these allegations are referred to and incorporated in the Appellant's Third-Party Complaint and in the Appellant's Brief.

There is no distinction to be drawn between the liability of a principal for the tortious act of his agent and the liability of a master for the tortious act of his servant. In both cases the liability is based on the master and servant rather than any agency principle; the liability for the tortious act of the employee is grounded upon the maxim of respondeat superior and is to be determined by considering from a factual standpoint the question whether the tortious act was done while the employee, whether agent or servant, was acting within the scope of

his employment. 3 Am. Jur. 2d 632.

If it is to be concluded that the employee was not acting pursuant to the employer's authorization, or within the scope of his employment, the Defendant employer may not be held liable. The employer may not be held liable for his employees willful misconduct even though done in the course of his employment, if it is not within the scope of his employment or in furtherance of the employer's business. 53 Am. Jur. 2d 457, Sandman vs. Hagan, 154 N.W. 2d 113.

A principal is not legally responsible for an agent's conduct when the agent performs an act within the general scope of his employment but with no intention to further the interests of the principal. NLRB vs. International Longshoremen's and Warehousemen's Union, 283 F 2d 58 (1960). There is no allegation that Respondents or the Trust profited from Erickson's conduct.

III

A MERE ALLEGATION OF "NEGLIGENCE IN HIRING" IS INSUFFICIENT TO STATE A CLAIM FOR LIABILITY OF A PRINCIPAL OR MASTER FOR CRIMINAL ACTS OF AN AGENT OR EMPLOYEE.

There is a line of cases holding that a principal may be liable on negligence theory for an employee's tortious conduct if the principal has prior knowledge of the employee's criminal record. 48 ALR 3d 359, Abraham vs. Onorato Garages, 50 Haw. 628,639,446 pd 821 (1968). In the instant case, there is no allegation of prior knowledge of criminal conduct or even of a

propensity for criminal conduct. The allegation that Respondents were "negligent in hiring" Elmer G. Erickson is in and of itself insufficient to state a claim upon which relief can be granted.


Even in the cases cited by Appellants, an essential element of the Complaint was that the Defendant "knew or had knowledge that an employee had played dangerous pranks to those properly on the premises of the Defendant." (App. Brief 14)

CONCLUSION

It is therefore respectfully submitted that Third-Party Complaint does not state a claim upon which relief can be granted. The cases cited in Appellant's Brief are not in point, but are only statements of general law which are not pertinent to forgery and alteration of negotiable instruments.

DATED this 8th day of June, 1978.

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by: 

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 16th day of June, 1978, I served two copies of the foregoing RESPONDENT'S BRIEF on the following persons by mail, postage prepaid:

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