

STATE OF MICHIGAN
COURT OF APPEALS

BRANDON AMERICO NORKO,

Plaintiff-Appellant,

UNPUBLISHED
February 6, 2001

v

Q-LUBE, INC.,

No. 218258
Oakland Circuit Court
LC No. 98-007240-NO

Defendant-Appellee.

Before: Collins, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff went to defendant's shop for an oil change. Defendant's employee, Luis Santiago, directed plaintiff to drive into a service bay. Plaintiff accelerated too fast and Santiago had to jump on the hood to avoid being run over. Plaintiff crashed through the exit door and Santiago was thrown from the vehicle. Santiago became irate and punched plaintiff in the face. Plaintiff filed this action, seeking to hold defendant liable for Santiago's actions.

The general rule is that an employer is liable for intentional torts committed by an employee who is acting both in the course and in the scope of his employment. An employer is not liable for intentional torts committed by an employee who is acting in the course but beyond the scope or apparent scope of his employment. *Green v Shell Oil Co*, 181 Mich App 439, 446; 450 NW2d 50 (1989); *Bryant v Brannen*, 180 Mich App 87, 98; 446 NW2d 847 (1989); *Leitch v Switchenko*, 169 Mich App 761, 765; 426 NW2d 804 (1988); *Borsuk v Wheeler*, 133 Mich App 403, 410; 349 NW2d 522 (1984). An employee is acting in the scope of his employment if his actions were taken to further or promote his employer's business. *Bryant, supra* at 98-99. An employee may be found to be acting within the apparent scope of his employment if the employer's conduct led a third person to reasonably believe that the employee was acting on the employer's behalf. *Leitch, supra* at 766. Whether an employee is acting within the scope or apparent scope of his employment is generally a question of fact for the jury unless it is clear that he was acting to accomplish some purpose of his own. *Id.*; *Green, supra* at 447; *Leitch, supra* at 765-766. "Intentional and reckless torts are generally held to be beyond the scope of

employment.” *Borsuk, supra*. Minor intentional torts may be found to be within the scope of employment if the employee is authorized to use reasonable means to accomplish the employer’s objectives or protect the employer’s property. *Bryant, supra* at 102-103.

Although Santiago was acting in the course of his employment, he was clearly acting outside the scope of his employment when he attacked plaintiff. There is no evidence that the attack was authorized by defendant, *Leitch, supra* at 766, or that Santiago’s duties included the discretionary or foreseeable use of force. See *Bryant, supra* at 102. Nor did Santiago attack plaintiff to protect Q-Lube’s premises or property from harm. Rather, his “action could only be construed as an attempt to accomplish his own purpose,” that being to avenge plaintiff’s assault upon his person, “not to further his employer’s business interests.” *Green, supra* at 447. Therefore, defendant cannot be held vicariously liable for Santiago’s attack on plaintiff.

An employer may be held liable for intentional torts committed by an employee who is acting outside the scope of his employment if he knew or should have known of the employee’s violent propensities. *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412-413; 189 NW2d 286 (1971); *Tyus v Booth*, 64 Mich App 88, 91; 235 NW2d 69 (1975). However, the employer does not have a duty “to conduct an in-depth background investigation of his employee” to determine if the employee has a history of violence. *Id.* at 92. In this case, plaintiff did not present any evidence to indicate that Santiago had acted violently at work in the past such that defendant knew or should have known that he was a danger to business patrons. Therefore, defendant cannot be held liable under the theory that it “negligently foisted [a] violent employee upon the public.” *Id.* at 91.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Martin M. Doctoroff
/s/ Helene N. White