[Cite as *Smith v. Evaline's Bridal*, 2009-Ohio-6520.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

DALINDA SMITH,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2009-T-0014**
- vs -	:	
EVALINE'S BRIDAL, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Warren Municipal Court, Case No. 2008 CVI 02945.

Judgment: Affirmed.

Dalinda Smith, pro se, 2947 State Route 5, S.W., Leavittsburg, OH 44430 (Plaintiff-Appellant).

Evaline's Bridal, pro se, 211 East Market Street, Warren, OH 44481 (Appellee).

Claudia J. Apostolakis, pro se, 115 North Aspen Court, #4, Warren, OH 44481 (Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Darlinda Smith (Darlinda), appeals from the Warren Municipal Court's judgment entry dismissing her claim after a trial to the bench.[1] For the reasons discussed below, the trial court's judgment is affirmed.

{¶2} On July 23, 2008, Darlinda filed a complaint in the Warren Municipal Court's Small Claims Division asserting an agent of appellee, Evaline's Bridal

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1. Although the caption of the case indicates appellant's name is "Dalinda," the record reveals her actual name is Darlinda.

(Evaline's), had absconded with her wedding gown after the ceremony and had it cleaned and packaged without her permission. She later amended her complaint to include the alleged agent, Claudia Apostolakis (Claudia). Darlinda sought $3,000.00 in damages. A trial on the matter was held on September 10, 2008, and November 5, 2008, after which the trial court dismissed Darlinda's complaint.

{¶3} The following facts were not disputed at trial: Darlinda purchased a wedding gown from Evaline's on September 29, 2006. On that date, the gown was paid for in-full and Darlinda wore her gown during her wedding. Darlinda formally invited Claudia to her wedding and reception and Claudia accepted the invitation. Once the ceremony concluded, Claudia helped Darlinda change from her wedding gown into a separate dress. At this point, factual disputes arise.

{¶4} After doffing the wedding gown, Darlinda stated she lost track of it. The next day, however, she testified Claudia called her indicating she had the wedding gown, along with certain accessories. According to Darlinda, Claudia said the merchandise was "all bagged up, packed, and ready to go ***" and Darlinda could pick it up at Evaline's at any time. Darlinda eventually received a bill in the amount of $169.34 for the cleaning and packaging.[2] Darlinda maintained she never authorized Claudia to secure these services. However, Evaline's refused to surrender the wedding gown until the bill was paid.

{¶5} At trial, Darlinda alleged Claudia was an employee of Evaline's and, although Claudia attended her wedding, she was acting as a "bridal consultant" while

2. We point out that the jurisdiction of a small claims court is limited to $3,000. Further, claims for punitive damages, exemplary damages, and prejudgment attachment are not permitted. R.C. 1925.02(A)(2)(a)(iii) and 1925.07. Even though Darlinda sought the full jurisdictional amount, the only proof of damages was the amount of the cleaning and packaging bill she refused to pay, i.e., $169.34. Although it does not affect the resolution of this appeal, it is worth noting that anything above this amount would have been speculative and perhaps exemplary.

present. She pointed out that Claudia delivered the gown on the wedding day, attended the wedding in her “work clothes,” and “kept running back and forth between the bridal shop and my wedding, exchanging shoes and everything on behalf of Evaline’s Bridal.” Moreover, later on, Darlinda testified one of the groomsman had to leave early and Claudia “took the tuxedo and said, ‘Give me my tuxedo’” and later returned the clothing to Evaline’s. Given this evidence, Darlinda maintained that Claudia was acting in her capacity as an agent of Evaline’s while at the wedding, and, therefore, Evaline’s was responsible for Claudia’s purportedly unilateral decision to have the gown cleaned and packaged.

{¶6} Steve Dubasik (Steve), part-owner of Evaline’s, testified on behalf of the store. Steve conceded that Claudia was a sales associate with Evaline’s. However, he asserted that Claudia was not being paid when she attended Darlinda’s wedding. As a result, Steve testified that Claudia was not attending the wedding as an agent or operative of Evaline’s and thus, Evaline’s was not responsible for absorbing the cost of the cleaning and packaging. Steve observed that Evaline’s cleaned and packaged the gown because Claudia called him and stated, “[Darlinda] wants the gown cleaned. [Darlinda] knew that there was a charge for it. [Claudia] told us that’s what Darlinda wanted, so I mean, her dispute is, basically, with Claudia, not with us.”

{¶7} Lori Dubasik (Lori), part-owner of Evaline’s, also testified on behalf of the store. Lori’s testimony, in large part, echoed Steve’s. She further pointed out that even though Darlinda characterized Claudia as a “bridal consultant,” Darlinda never paid Evaline’s for consulting services or alternative bridal services.

{¶8} Next, Claudia testified that she did work at Evaline’s on the morning of the wedding, but took the afternoon off to attend Darlinda’s wedding and reception. Claudia

stated she only took the wedding gown after Darlinda asked her to do so. Claudia testified:

{¶9} "The dress left the reception, went in my car and from my car it went to the bridal shop, which I did like [Darlinda] asked. [Darlinda] asked me to have it cleaned and that's what I did. And that's the truth. I mean, because there would be no other reason for me to take it. She had parents. She had her wedding coordinator there. ***"

{¶10} Throughout her testimony, Claudia underscored that she took the dress only because Darlinda told her to do so; in other words, she "was just being a nice guy."

{¶11} On December 3, 2008, after trial concluded, the magistrate issued his decision dismissing Darlinda's complaint. The trial court subsequently adopted the magistrate's decision. Darlinda now appeals, alleging two assignments of error. Her first assignment of error provides:

{¶12} "The trial court erred to the prejudice of the plaintiff-appellant by finding that Defendant-Appellee Claudia Appostoakis [sic] was not representing Evaline's Bridal at the wedding on September 30, 2006."

{¶13} Under her first assignment of error, Darlinda essentially argues the trial court's decision was against the weight of the evidence. Under the civil manifest-weight-of-the-evidence standard, an appellate court must presume that the findings of the trier of fact are correct. This presumption arises because the trier of fact has had the opportunity "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶14} Darlinda's argument is premised upon fundamental agency principles; to wit, she maintains Evaline's is liable because Claudia was working for the shop and acting within the scope of her employment when she took the dress. We disagree.

{¶15} Darlinda's position is based upon the operation of the doctrine of respondeat superior, which provides an employer may be liable for the tortious act of its employee if that employee was acting within the scope of her employment when she committed the tortious act. *Groob v. KeyBank*, 108 Ohio St.3d 348, paragraph two of the syllabus, 2006-Ohio-1189. An individual is acting within the scope of her employment when: "(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master." *Akron v. Holland Oil Co.*, 102 Ohio St.3d 1228, 1231, 2004-Ohio-2834.

{¶16} Here, there was evidence presented on behalf of Evaline's that Claudia was neither "on the clock" nor being paid by Evaline's when she attended the wedding. Further, Lori testified that Darlinda did not pay Evaline's for any bridal consultation. Finally, it was undisputed that Claudia, not Evaline's, received a personal invitation to Darlinda's wedding and reception. There was additional evidence submitted indicating that Darlinda and Claudia had established a personal relationship that existed independent of Claudia's employment as a sales associate for Evaline's. Viewing the evidence as a whole, it is reasonable to conclude that Claudia was attending the wedding and reception in a personal capacity and not as an agent of Evaline's. Therefore, we hold the decision of the trial court did not weigh against the manifest weight of the evidence.

{¶17} Our holding is further supported by certain technical nuances of the law relating to vicarious liability. In particular, vicarious liability premised upon the doctrine of respondeat superior presupposes a pre-existing tort. Darlinda does not, in her brief, specify the tort upon which she bases her argument. However, because Darlinda maintains Claudia took the gown without her knowledge and had it cleaned and packaged without her consent, it is reasonable to assume that the tort underlying her claim is conversion. A claimant attempting to establish the tort of conversion must demonstrate the defendant wrongfully exerted control over the claimant's personal property inconsistent with or in denial of his or her rights. *Abbe Family Found. and Trust v. Portage Co. Sheriff's Dept.*, 11th Dist. No. 2005-P-0060, 2006-Ohio-2497, at ¶29.

{¶18} Here, Darlinda testified she did not give Claudia permission to take the gown; in fact, she specifically stated she did not want the gown cleaned and packaged by Evaline's at all. It therefore appears Darlinda presented sufficient testimony to establish a prima facie case for conversion.

{¶19} However, conversion is an intentional tort. Intentional torts are typically beyond the scope of employment because they in no way facilitate or promote the employer's business. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 58. Notwithstanding this rule, "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." *Tarlecka v. Morgan* (1932), 125 Ohio St. 319, 324. Further, based on agency principles, an employer can be vicariously liable for injury to a third party if the employer expressly authorizes or otherwise ratifies the employee's tortious actions. *Fulwiler v.*

Schneider (1995), 104 Ohio App.3d 398, 406, citing *State ex rel. Riley Constr. Co. v. E. Liverpool City School Dist. Bd. of Edn.* (1967), 10 Ohio St.2d 25, 29.

{¶20} There was no evidence that Evaline's previously, let alone regularly, takes and cleans wedding gowns without a bride's consent for the purpose of advancing its business. Further, there was nothing to indicate that such practices could be considered ordinary and natural incidents or attributes of the service Evaline's renders, or a natural, direct, and logical result of it. *Tarlecka*, supra. Finally, there was no evidence that Evaline's expressly authorized or implicitly ratified the alleged conversion of the gown. For these additional reasons, Darlinda's vicarious liability argument fails.

{¶21} Darlinda's first assignment of error is overruled.

{¶22} Her second assignment of error states:

{¶23} "The trial court erred to the prejudice of the plaintiff-appellant by not ruling upon any claim that Plaintiff-Appellant Darlinda Smith may have against Defendant-Appellee Claudia Apostoakis [sic]."

{¶24} Darlinda's second assignment of error asserts that the trial court erred by not resolving her claim against Claudia after she properly amended her complaint to include Claudia as a party-defendant. We again disagree.

{¶25} The trial court's decision was all-encompassing. That is, it operated as a judgment against Darlinda or, in the alternative, a judgment in favor of both party-defendants.[3] Moreover, the trial court's ruling is consistent with a reasonable

3. With this in mind, we point out that the trial court's decision to dismiss Darlinda's complaint after a trial on the merits is somewhat unusual. Dismissal is generally a means of removing a case from a court's docket prior to, rather than after a trial on the merits. We acknowledge the rules of civil procedure and rules of evidence do not apply to actions brought in small claims. See Evid.R. 101(C)(8); Civ.R. 1(C)(4). Still, it is typical practice for a trial court, after hearing all the evidence, to render a judgment in favor of a party or parties to a case. However, these observations do not affect the practical impact of the judgment in this case, i.e., after hearing the evidence, the court determined the party-defendants presented a more credible foundation for their position and were therefore entitled to judgment in their favor.

construction of the testimony and evidence. As discussed above, the court properly determined that Evaline's was not vicariously liable for Claudia's alleged tortious behavior. Furthermore, in ruling as it did, the court concluded that Darlinda failed to establish that Claudia engaged in any civil malfeasance. Simply because Darlinda testified she did not authorize Claudia to take the gown does not imply the court was required to believe her. This is especially so where, as here, there was competing testimony offered by Claudia indicating Darlinda did, in fact, ask her to take the gown and have it cleaned. This testimony was buttressed by the testimony of Evaline's owners, Lori and Steve Dubasik, who specifically stated they cleaned the gown because Claudia explained Darlinda wanted this service. The trial court apparently found this testimony more credible than that offered by Darlinda. We do not believe the trial court erred in ruling in the defendants' favor.

{¶26} Darlinda's second assignment of error is without merit.

{¶27} As each assignment of error is overruled, it is the judgment of this court that the judgment entry of the Warren Municipal Court is affirmed.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.