

IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO

JEFFREY ABRAMS, et al.

Appellants,

vs.

CHARLES M. WORTHINGTON, et al.,

Appellee.

CASE NO. 07-0087

ON APPEAL FROM THE
FRANKLIN COUNTY COURT
OF APPEALS, TENTH
APPELLATE DISTRICT

COURT OF APPEALS
CASE NO. 05AP-912

MEMORANDUM IN OPPOSITION TO JURISDICTION
OF CHARLES M. WORTHINGTON d.b.a. A FAMILY MOVING COMPANY

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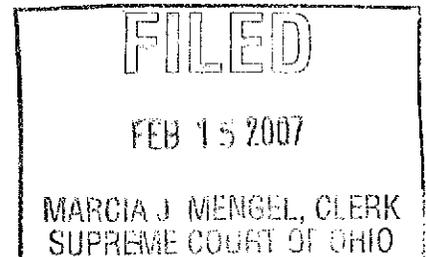


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An employer is not liable for the criminal acts of its former employee unless the former employee uses some *indicia* of authority of the former employer to gain access to the victim and the employer was negligent in permitting the former employee to use that *indicia* of authority. (Restatement of the Law 2d, Agency (1958) 458, Section 213, *applied*).

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STATEMENT OF WHY THIS CASE IS NOT OF GREAT PUBLIC OR GENERAL INTEREST

This Court has already recognized the tort of negligent hiring in *Byrd v. Faber* (1991), 57 Ohio St.3d 56 where you distinguished *respondeat superior* from the separate tort of negligent hiring. Thus, there are no new issues being raised by appellants herein and the law is already well established on the subject. The remedy sought by appellants is factually unique to their situation and does not raise any question of great public or general interest.

The hypothetical situation suggested by appellants in their Memorandum in Support of Jurisdiction is preposterous, and factually inapposite to the matter at bar. Indeed, in appellants' hypothetical the perpetrator actually used an *indicia* of authority to gain access to the victim's home and was still employed when he gained entry. The existing elements of the tort of negligent hiring would apply to that imaginary set of facts. However, in the real case presented by the matter at bar the perpetrator had been terminated for several months before committing an unforeseeable crime against customers of his former employer. Moreover, the former employee of appellee **did not** use any *indicia* of authority to gain access to the property and was not terminated after already having gained access to the home of the victim.

Applying the logic of appellants' argument, the owner of a car wash would be subject to liability for the criminal acts of a former employee because the latter may peer through the window of an expensive automobile of a customer while pre-washing the wheels and get a glimpse of the address of the owner; quit or be fired; and, then later commit a crime at that home.

Or, the owner of a company that paints addresses on the curbs in front of homes would be potentially liable for the criminal acts of a former employee because the latter may ascertain that a

house in an expensive neighborhood is an easy target and then break and enter into that home many months after being fired from the company.

Or, the owner of a company that provides private refuse collection may be liable for the criminal acts of a former employee because the latter was able to determine that a house didn't appear to have security, even though the employee never entered onto the actual property and merely made the deduction based upon observation.

Would the employer of someone hanging bags of advertising coupons on mailboxes be liable when the former employee returns to a neighborhood many months after being terminated and sexually molests a child because it is determined that the former employee, while delivering the ads, saw the child playing without supervision?

There would be no limit to the situations where an employer would be liable for the unforeseeable criminal acts of a former employee committed after the termination of the employment relationship. Under such a scenario, the employer would become an insurer for an indefinite period of time and for the full range of criminal activities including a Ramboesque style home invasion.

No one disputes that an employer can be held liable for negligence for hiring a known child molester who then molests a child while within the course and scope of his employment as a day care worker. However, it becomes problematical to fashion a rule that holds the employer responsible for the criminal acts of **former employees** unless the perpetrator uses some *indicia* of authority to gain access to the victim. If the child molester is fired and three years later sees the child on the street and molests him, is the former employer liable for that inhumane criminal act? The initial response by any lawyer practicing in Ohio would be "NO," but any new standard that resembles what is urged by appellants would open the door to liability unlimited in time and

unlimited in scope. Indeed, how would the insurance industry rate such unconstrained exposure? How could businesses protect themselves from such unforeseeable crimes?

This certainly is not a case of first impression with respect to the liability of an employer for the negligent hiring of an employee who then injures someone while in the course and scope of his or her employment. For the aforementioned reasons, this Court should not accept jurisdiction of this case.

STATEMENT OF THE CASE

Appellee does not take exception to the procedural posture of the case as set forth in the Statement of the Case presented by appellants.

STATEMENT OF FACTS

Appellee Charles (Michael) Worthington is the sole owner of "A Family Moving Company" which provides moving services in Columbus and the central Ohio area for both residential and commercial customers. Ninety-five percent of the business is residential moving and involves a team of two to three movers. None of the movers go on a job unsupervised. A Family Moving Company had been in existence for fifteen years prior to the incident that occurred at appellants' home.

From approximately February 1999 until March 2004, Shawn Scott was an employee of A Family Moving Company. At some point following the hiring of Scott, Worthington learned that Scott had been convicted of forgery before he was an employee, which stemmed from the passing and/or writing of bad checks. However, during the time of Scott's employment with the company, Worthington never noticed any problem with Scott's abilities or work ethic and Worthington was not aware of any other problems that he had with the law.

On or about August 27, 2001, A Family Moving Company hired Scott's brother, Chad Sullivan, as a part-time employee. During the hiring of Sullivan, there was no information ascertained to indicate that Sullivan had been convicted of any previous crimes and specifically any violent crimes. Worthington checked the criminal records of potential employees in Franklin County Municipal Court but did not believe that he or anyone else at the company checked other counties or their criminal docket systems to find out if an applicant had a criminal record in another county. Worthington did not check the records of the Franklin County Common Pleas Court.

Sullivan was employed by A Family Moving for about three and one-half to four months and while he was employed, he appeared to Worthington to have an attitude problem and was not reliable as an employee. In other words, he was perpetually late for work or a no show many mornings. There were no complaints from customers that Chad was stealing any items from customers during that time and there were no complaints of him threatening customers or co-workers or acting violently toward anyone. On January 19, 2002, Worthington fired Chad Sullivan from because Worthington did not like his attitude and overall work ethic.

On December 21, 2001, appellants Jeff Abrams and Joyce Healy-Abrams hired A Family Moving to move furniture and other household items from a warehouse near Port Columbus International Airport to their newly constructed home located in Pataskala, Ohio. According to Abrams, the house was situated well off the road; was not visible to passing traffic; and, had a market value in the range of \$2 million. A Family Moving used a crew of three (3) employees to perform this work with one of the employees being Chad Sullivan. Shawn Scott was not involved in the move. The movers arrived for the job at about 8:30 a.m. and completed the move about 6:40 p.m. During the day, there were no concerns of appellants in their interactions with any of the moving company personnel. Further, the moving company employees were not discourteous and

did nothing to suggest that they were casing the house or otherwise planning a home invasion. At the conclusion of the move, appellants provided either a \$100 or \$200 tip to the three moving company employees.

On March 14, 2002, almost three months after the move, and several months after Chad Sullivan had been fired, five (5) or six (6) men dressed in military fatigues and masks forced their way into appellants' home in Pataskala shortly after nightfall. The men were also equipped with various firearms and masks and made their assault while Jeff Abrams was in the back yard walking the dogs. Abrams saw the masked men and ran for the house but was overcome by force. When the men gained entry into the home, they tied both Jeffrey Abrams and Joyce Healy-Abrams up with duct tape and proceeded to ransack the home. The men took numerous items of appellants including Joyce's diamond ring and the Abrams' BMW vehicle. The Abrams also claim to have been injured by the perpetrators and they have undergone extensive psychological counseling.

An investigation was completed by the Pataskala police department and eventually Chad Sullivan and a number of other individuals were arrested and charged for the crime. None of the other perpetrators were linked to A Family Moving Company. Sullivan was identified as being connected to the crime due to DNA from a mask which was found in the recovered BMW. The DNA was connected to Chad Sullivan after Sullivan committed other non-related crimes following the invasion of appellants' home and DNA from those crimes was then matched to the DNA collected from the home invasion. Prior to the later crimes, Sullivan's DNA was not on file with the State of Ohio Crime Lab. Sullivan was ultimately convicted of the home invasion crime and is now incarcerated.

Shawn Scott was not arrested or charged with any crime connected to the home invasion and there has never been any evidence adduced in the criminal case or the case below that Scott was

in any way involved with the crime, either as an accomplice or someone planning the crime. In fact, there was never any admissible evidence adduced in the trial court that a criminal check would have revealed past crimes committed by Sullivan that mirrored the home invasion. While anecdotal evidence suggests that Sullivan may have had a theft record in Madison County, there is absolutely no evidence that he had ever been involved in a home invasion prior to his employment with appellee.

LAW AND ARGUMENT

Response to Proposed Proposition of Law No. 1

An employer is not liable for the criminal acts of its former employee unless the former employee uses some *indicia* of authority of the former employer to gain access to the victim and the employer was negligent in permitting the former employee to use that *indicia* of authority. (Restatement of the Law 2d, Agency (1958) 458, Section 213, *applied*).

The home invasion took place several months after Sullivan was fired from A Family Moving Company, and Shawn Scott was not involved in the invasion whatsoever. The move took place on December 21, 2001; Chad Sullivan was fired on January 19, 2002; and, the home invasion occurred on March 14, 2002.

First and foremost, a moving company is under no *carte blanche* legal duty to check the criminal records of its employees before hiring them. Even if it was under such a legal duty, in the absence of any evidence that an employee was involved in a prior home invasion or similar crime, it is not foreseeable that an employee would commit such a crime, especially **after the termination of his employment**. Public policy is not well served where reformed criminals are excluded from securing gainful employment, especially when it involves unskilled labor and the employee is never alone with a customer, as is the case herein.

Second, even though there was no evidence adduced in the trial court that appellee knew or should have known about any criminal propensity of Chad Sullivan to commit home invasions, had appellee known of his past and the hiring of Sullivan was negligent, once Chad Sullivan was terminated there was a break in the chain of causation. In other words, appellee cannot be held liable for criminal acts committed by Chad Sullivan after the termination of the employment relationship unless appellee also was negligent for allowing its former employee to use an *indicia* of authority to gain access to the victim.

By way of example, an employer that issues identification cards for its employees to use for door to door sales should be held liable if it fails to retrieve that card upon the termination of the employee and the former employee then uses the card to gain access to someone's home and then commits a crime. That type of criminal behavior is foreseeable and, therefore, a duty is imposed upon the employer to exercise reasonable care to ensure that all *indicia* of authority are retrieved from the former employee.

This Court has recognized the tort of negligent hiring. *Staten v. Ohio Exterminating Co.* (1997), 123 Ohio App.3d 526 *citing* *Byrd v. Faber* (1991), 57 Ohio St.3d 56. Negligent hiring has been described as follows:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

* * *

(b) in the employment of improper persons or instrumentalities in work involving **risk of harm to others**:

* * *

(d) in permitting, or failing to prevent, negligent or other tortuous conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities **under his control**.

Staten v. Ohio Exterminating Co. (1997), 123 Ohio App.3d 526 *quoting* Restatement of the Law 2d, Agency (1958) 458, Section 213.

In the absence of a special relationship, such as the employment relationship, there is no common law duty to anticipate or foresee the criminal activity of a person and there is no duty to protect third persons. *Evans v. Ohio State Univ.* (1996), 112 Ohio App.3d 724. As a result, the duty to protect against injury caused by third parties, which may be imposed where a special relationship exists, is expressed as an exception to the general rule of no liability. *Id.*

The comments to the Restatement of the Law further explain how the liability can be determined. Comment d states as follows, in pertinent part:

One who employs another to act for him is not liable under the rule stated in this Section merely because the one employed is incompetent, vicious, or careless. If liability results it is because, under the circumstances, the employer has not taken the care which a prudent man would take in selecting the person for the business at hand. What precautions must be taken depend upon the situation. One can normally assume that another who offers to perform simple work is competent. If, however, the work is likely to subject third persons to serious risk of great harm, there is a special duty of investigation.

Id.

To establish negligent hiring, a plaintiff is required to establish:

(1) The existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries.

Id. citing *Evans v. Ohio State University* (1996), 112 Ohio App.3d 724.

An employer is required to exercise reasonable care in the selection of employees who will have the opportunity to commit a crime against a third person **during the performance of their employment duties.**¹ *Id.* Thus, an employer may be negligent if he or she knew or should have known that the employee had a propensity of violence and such employment may create a

circumstance where the violence would harm a third person (during the employment relationship). *Id.* “The foreseeability of a criminal act depends on the knowledge of the defendant, which must be determined by the totality of the circumstances, and it is only when the totality of the circumstances are ‘**somewhat overwhelming**’ that the defendant will be held liable. *Id. quoting Evans*, at 742 (Emphasis added).

To put the issue of negligent hiring and retention in perspective, it is necessary to consider the context of a claim for negligent hiring. In the *Staten* case, an employee, who gained entrance to the plaintiff’s home for purposes of exterminating it, was accused of stealing a diamond ring from the customer, while he was an employee of that defendant. The employee was asked to undergo a polygraph test by his employer after the customer reported the theft but he never returned to work and was ultimately terminated. The employee was eventually charged with felony theft and approximately four (4) months later he shot and killed the customer. The customer’s estate filed an action against the employer for negligent hiring because the employee had a criminal record before he was hired by the exterminating company. Summary judgment was granted in favor of the defendant-employer and the estate appealed. This Court of Appeals held that it was not foreseeable that the employee would have killed the customer six (6) months after his employment ended and four (4) months after charges were filed against him. Further, it was equally not foreseeable even if the convictions and criminal charges of the employee had been considered. *Staten, supra*.

Appellants herein premise their theory of recovery on appellee having a duty to refrain from hiring persons with a criminal background. In other words, appellants are asking that this Court hold that persons charged with a crime, or persons convicted of crimes, be eliminated from the unskilled labor force in Ohio, regardless of whether those persons have served their time or

¹ Again, Sullivan did not commit the home invasion while he was an employee of appellee.

otherwise paid their debt to society. Implementing appellants' theory would lead to the employer being held responsible for all future crimes committed by the former employee. Even if the employer ultimately prevailed in the numerous lawsuits that would be filed by victims of crime, the costs to the company and society would significantly outweigh any benefits to injured parties.

Moving companies hire unskilled laborers with strong backs. They do not hire persons with graduate degrees, law degrees or other advanced diplomas. It should not surprise anyone that moving companies hire persons with criminal records, including theft offenses. However, a prior criminal conviction does not render a strong-backed worker "incompetent," and to protect its business interests an employer should not have to resort to fortune telling to determine whether a former employee will engage in unforeseeable criminal activity and expose the company to liability.

Further, in the matter at bar, Sullivan forcibly gained entrance into the Abrams home and tied up the victims. He did not use any knowledge gleaned from his former employment relationship in order to gain access, such as undermining the home security system, or using the layout of the premises to his advantage. Rather, Sullivan and his fellow criminals forced their way into the house at gunpoint dressed in military fatigues. Those actions were not reasonably foreseeable, and have no relationship whatsoever with Sullivan's competence as a mover, or his former employment with A Family Moving Company.

Comment d to the Restatement of the Law 2d, Agency (1958) 458, Section 213 states that "one can normally assume that another who offers to perform simple work is **competent**. If, however, the work is likely to subject third persons to serious risk of great harm, there is a special duty of investigation." In the matter at bar, the work that Sullivan was hired to do was simple, albeit physically strenuous. There was no duty on the part of appellee to conduct criminal background checks, or to refrain from hiring former criminals. There was no special duty to investigate.

The Franklin County Court of Appeals has opined that in those rare cases where courts have found a jury question existed concerning the reasonableness of an employer's actions when the injury occurs after the completion of the employment relationship, the **former employee used an "indicia of authority"** or a representation that he was still employed by the defendant to gain entrance to the victim's home (i.e., former employee representing that he was still employed by the company in order to gain entrance). *Staten, supra* at 531. Those facts are not present in the matter at bar. As stated by the Court in *Staten, supra* at 531, "[m]ost of the cases involving negligent hiring involve a present employee, not a former employee. . ." To hold an employer liable for the criminal acts of a former employee would be tantamount to making that employer an insurer for acts that are not otherwise insurable. Indeed, appellants suggest that A Moving Company should be held liable for all criminal acts committed by its former employees with past criminal records, for eternity.

In this case, there is no dispute that Chad Sullivan committed the criminal acts well after his employment relationship with appellee was terminated. The leading case with similar facts was decided in favor of the former employer in *Evans v. Ohio State Univ.* (1996), 112 Ohio App.3d 724, 740 where the court affirmed judgment in favor of the employer. That case also involved the criminal acts of a former employee, committed after the termination of the employment relationship. The *Evans* court stated the following:

Whether considering a claim based upon negligent hiring or one for failure to control the conduct of a third person (and even assuming, *arguendo*, the existence of a special relationship), the issue of whether a duty is owed is based upon the foreseeability of the injury.

In *Fed. Steel & Wire Corp. v. Ruhlin Constr. Co.* (1989), 45 Ohio St.3d 171, 173-174, 543 N.E.2d 769, 772-773, the court held that:

". . . Ordinarily, there is no duty to control the conduct of a third person by preventing him or her from causing harm to another, except in cases where there exists a special relationship between the actor and the third person which gives rise

to a duty to control, or between the actor and another which gives the other the right to protection. . . . Thus, liability in negligence will not lie in the absence of a special duty owed by a particular defendant. . . ."

"We have found that '[t]he existence of a duty **depends on the foreseeability** of the injury. . . . The court in *Menifee, supra*, set forth the following test to be used in order to determine foreseeability: '[W]hether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act,' . . . We recognize that there is no common-law duty to anticipate or foresee criminal activity. . . . Thus, the law usually does not require the prudent person to expect the criminal activity of others. As a result, the duty to protect against injury caused by third parties, which may be imposed where a special relationship exists, is expressed as an exception to the general rule of no liability. . . ."

Concerning criminal acts of a third party which, the defendant might reasonably anticipate, "the mere fact that misconduct on the part of another might be foreseen is not of itself sufficient to place the responsibility upon the defendant." Prosser & Keeton, *supra*, at 305. Rather, "[i]t is **only where misconduct was to be anticipated, and taking the risk of it was unreasonable**, that liability will be imposed for consequences to which such intervening acts contributed." *Id.* at 313. (Emphasis added).

The issue before the court in *Evans* was whether Ohio State, through its county extension office, owed a duty of care extending to plaintiff in its decision to hire James Waites as a fair judge or clinic speaker on the basis that such employment might create a reasonably foreseeable risk of harm. The court stated that "[m]ore specifically, the issue is whether defendant, knowing of Waites' prior criminal record, should have reasonably foreseen the likelihood that, as a result of Waites' employment as a clinic speaker, Waites would later become personally involved within the Ashtabula County 4-H community, come in contact with Stephanie (not herself a member of 4-H during Waites' employment), and engage in wrongful misconduct." 112 Ohio App.3d at 741.

In *Evans*, the court found that "[p]laintiffs focus primarily upon the fact that defendant, was made aware of Waites' prior criminal record, such knowledge presumably giving rise to a duty (either to warn others or to control a third person) extending to all 4-H members Waites came in contact with subsequent to his employment as a clinic speaker. Assuming that defendant's

knowledge of Waites' prior criminal record, in and of itself, defined the scope of the duty, the requisite inquiry would end. **The scope of the duty, however, is "limited to cover only those intervening causes which lie within the scope of the foreseeable risk, or have at least some reasonable connection with it . . ."** Prosser & Keeton, *supra*, at 312. *Id.*

The *Staten* court, reached that very conclusion when it affirmed the trial court's ruling that the evidence of previous criminal charges would be inadmissible, and even if admitted, would require impermissible inferences. *Staten, supra at 531.*

Appellants have cited three out of state decisions to support their position. However, those cases are in no way similar to the matter at bar. In *Marquay v. Eno* (1998), 139 N.H. 708, 719 the Court held that "liability exists not because of when the injury occurs, but because 'the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct.'" How is any employer going to anticipate that an employee is likely to commit a home invasion? Presumably, if someone has been convicted of such a crime, he or she will not be in the workplace for many, many years and instead will be incarcerated. The gap in employment is the red flag to the hiring employer that may trigger a duty to investigate.

In *McGuire v. Arizona Protection Agency* (1980), 125 Ariz. 381, the Court noted and emphasized the sensitive nature of the work installing alarm systems and that the perpetrator used his knowledge of the system to gain access to the home to determine that the employer owed a duty to the customer to employ a "responsible and trustworthy person." There is no similarity between a person installing burglar alarms and a mover.

In *Abbott v. Payne* (1984), 457 So.2d 1156, 1157 the Florida Court of Appeals held that "an employer who knows that an employee will have free and independent access to the homes of its

customers has an obligation to make reasonable efforts to inquire into such employee's past employment and past records." The critical factor influencing the Court's decision that a duty to investigate arose was whether the employee would have "**free and independent access**" to the homes of the customers. In the case *sub judice*, Chad Sullivan was never afforded independent access to the homes of customers. Rather, he worked under supervision with other movers.

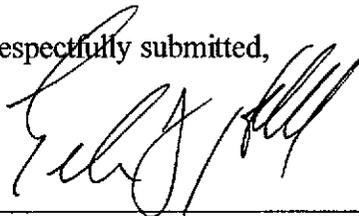
There simply is no duty of an employer to protect third persons from criminal acts committed by former employees after the termination of the employer-employee relationship unless the employer was negligent for permitting the perpetrator to use an *indicia* of authority to gain access to the victim. It is the *indicia* of authority that creates the causal link between the negligent act and the injury. If this Court were to accept the proposition of law advocated by appellants, an employer would be deemed to be an insurer of all criminal actions committed by its former employees who had prior criminal records. No employer would hire a person with a criminal record under such circumstances, for any job, even if the individual had paid his or her debt to society, and more importantly, even if the crime bore no reasonable relationship to the skills needed for competency on the job.

Does this Court want to send a message to Ohio businesses that they will pay for the sins of their employees forever if they hire persons with criminal records? If appellants prevail, persons with criminal records will be removed from the workplace in Ohio and presumably be forced to live on public assistance or move to states that permit ex-cons to serve their time and then earn an honest living. The Scarlet Letter died with Nathaniel Hawthorne and should not be resurrected merely because of the unforeseeable and unfortunate attack on appellants by a former employee of appellee.

CONCLUSION

For the foregoing reasons, appellee respectfully requests that this Court refuse to exercise jurisdiction over this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon Karl H. Schneider, Attorney for appellants, MAGUIRE & SCHNEIDER, L.L.P., 250 Civic Center Drive, Suite 500, Columbus, Ohio 43215, by regular United States mail, postage pre-paid on this 14th day of February, 2007.



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