

**537 S.E.2d 573**  
**260 Va. 533**  
**GINA CHIN & ASSOCIATES, INC.**  
v.  
**FIRST UNION BANK.**

**Record No. 992557.**  
**Supreme Court of Virginia.**  
**November 3, 2000.**

Simon M. Osnos, Falls Church, for appellant.

Daniel S. Fiore, Arlington, for appellee.

Present: All the Justices.

KOONTZ, Justice.

In this appeal, we consider whether the trial court erred in striking the evidence at the conclusion of the plaintiffs case-in-chief by ruling, as a matter of law, that a bank teller who participated in a scheme to deposit forged checks was acting outside the scope of his employment, thus relieving his employer from civil liability for those acts.

#### **BACKGROUND**

\* \* \*

In 1994, Henry Steven Cardenas was employed as a teller by First Union Bank. His duties included, among other things, the receiving of cash and checks for deposit into the accounts of the bank's customers. At the beginning of his employment, Cardenas received "about two weeks" of training. During that training, First Union instructed Cardenas not to accept checks made payable to businesses for deposit into personal accounts or to accept checks for more than \$7,000 for deposit without a supervisor's approval.

Prior to beginning his employment with First Union, Cardenas was acquainted with Amie Cheryl Lehman, who was dating Cardenas' brother. Shortly after Cardenas began working as a teller, he moved into an apartment with his brother and Lehman. Lehman, who had formerly been a teller at Signet Bank, was

employed at that time by Gina Chin & Associates, Inc. (Chin), a food wholesaler, as the firm's accounts payable clerk.

After Cardenas had been working at First Union "a little over a year," Lehman, relying on her knowledge as a former bank teller, requested his assistance in depositing a forged check into her First Union account. The check was drawn on Chin's account at Signet Bank,<sup>1</sup> and was made payable to one of Chin's suppliers. Lehman created the check by entering a false invoice into Chin's accounts payable computer program, which produced the check on a printer. Lehman then forged both the signature of Gina Chin, Chin's president, as drawer and the endorsement of the supplier making the check payable to Lehman.

Cardenas at first refused to assist Lehman, "but then she kept on insisting and insisting and then she convinced me, I guess, by offering me some money on the side." Lehman told Cardenas that "it wouldn't come back to [him] at all" because she reconciled the bank statements for Chin's account and could intercept the statements with the forged checks before they came to the attention of the firm's principals. Cardenas thereafter deposited the check into Lehman's First Union account. The drawer bank paid the check, debiting the amount from Chin's account.

Ultimately, using the forgery scheme outlined above, Lehman and Cardenas succeeded in depositing \$270,488.72 in forged checks into Lehman's personal account at First Union.<sup>2</sup> Cardenas received approximately 20 percent of the funds deposited. After Lehman left her employment with Chin, Signet Bank

discovered the forgery scheme and reported its findings to Chin and the police. Lehman and Cardenas subsequently were convicted of one count of bank fraud each in federal court.

On June 11, 1996, Chin filed a motion for judgment against First Union seeking \$270,488.72 in damages resulting from the forgery scheme of Lehman and Cardenas. Chin alleged that First Union was \* \* \* vicariously liable for Cardenas' criminal acts.

\* \* \*

Upon remand, a jury trial was commenced in the trial court on July 17, 1999. \* \* \* [T]he trial court stated "the primary issue is scope of employment." Chin then proceeded to produce its evidence to the jury.

Cardenas, Lehman, and Donald Chin, Chin's treasurer, were each called as witnesses for Chin. Consistent with the facts previously related herein, Cardenas and Lehman detailed the scheme to forge the checks and to deposit them into Lehman's account. Cardenas further, testified that after he left his employment with First Union, Lehman continued the forgery scheme using her account at another bank where Cardenas' brother worked as a teller. Donald Chin testified concerning the failure of Chin to detect the forgery scheme. At the conclusion of Chin's case-in-chief, the jury was read stipulations of fact, including the stipulation that Cardenas' acts were not known to his supervisors.<sup>3</sup>

First Union moved to strike Chin's evidence, asserting that Chin had failed to establish that Cardenas was acting within the scope of his employment in knowingly accepting the forged checks for deposit. First Union argued that "although taking these checks may have been incidental to First Union's business because it takes checks for deposit, there was no evidence that it was in furtherance of First Union's interest." First Union contended that this was so because Cardenas willfully violated its policies concerning the deposit of commercial checks into personal accounts and

accepting certain checks without management approval. Thus, First Union argued that Cardenas was not acting in furtherance of its interest and, hence, not within the scope of his employment.

Chin, citing *Commercial Business Systems, Inc. v. BellSouth Services, Inc.*, 249 Va. 39, 453 S.E.2d 261 (1995), and other cases, responded that the specific wrongful act by the employee need not be in furtherance of the employer's interest so long as the service that the employee was performing at the time was in the course of his employment. Chin asserted that its evidence showed that Cardenas was acting as an employee of First Union when he accepted the forged checks for deposit.

\* \* \* [T]he trial court sustained First Union's motion to strike Chin's evidence. In the final order dismissing the case with prejudice, the trial court ruled as a matter of law that Cardenas' acts "were not within the scope of the employee's authority, being in contravention of First Union's directives, and they were not within the scope of employment as they were shown not to be in furtherance of First Union's interests; and... reasonable persons cannot differ on the conclusion reached herein based on the evidence presented by the Plaintiff, with all inferences most favorable to the Plaintiff." We awarded Chin this appeal.

## DISCUSSION

\* \* \*

Here, it may well be reasonable to conclude that a bank teller does not intend to further the interest of his employer bank when he knowingly accepts forged checks for deposit for his own gain. However, that does not resolve the legal issue presented[.]

\* \* \*

Settled principles guide the trial court's considerations. While the plaintiff has the burden of persuasion on the issue whether the employee was acting within the scope of his employment at the time of the act complained

of, we have consistently held that proof of the employment relationship creates a *prima facie* rebuttable presumption of the employer's liability. *McNeill v. Spindler*, 191 Va. 685, 694-95, 62 S.E.2d 13, 17-18 (1950). Thus, "[w]hen an employer-employee relationship has been established, the burden is on the [employer] to prove that the [employee] was not acting within the scope of his employment when he committed the act complained of, and ... if the evidence leaves the question in doubt it becomes an issue to be determined by the jury." *[Citations]*

\* \* \*

We emphasize that the employee's improper motive is not irrelevant to the issue whether the act was within the scope of employment. Rather, it is merely a factor to be considered in making that determination, and, unless the deviation from the employer's business is slight on the one hand, or marked and unusual on the other, but falls instead between those two extremes, the question is for the jury. \* \* \*

\* \* \* First Union does not contest that Chin produced clear evidence that established the necessary employment relationship between Cardenas and First Union. Accordingly, Chin's evidence established a *prima facie* case of First Union's liability.

First Union contends, however, that Chin's evidence was also sufficient to meet First Union's burden of production on the issue whether Cardenas' acts were nevertheless outside the scope of that employment and, moreover, that this evidence was sufficient to rebut the presumption of liability as a matter of law. We disagree.

First Union asserts that Chin's evidence establishes "that Cardenas' wrongful acts were not "expressly or impliedly directed by the employer" because he violated directives in accepting commercial checks for deposit into a personal account, in failing to obtain a manager's approval to accept high value checks for deposit, and in knowingly accepting checks for deposit

with forged endorsements. This assertion is without merit because the act need not be expressly or impliedly directed by the employer in order for the act to occur within the scope of the employment. Similarly, an act committed in violation of an employer's direction is not always beyond the scope of the employment. Rather, as previously noted, the test is "whether the service itself, in which the tortious act was done, was within the ordinary course of" the employer's business. In this instance, it is clear that accepting checks for deposit by a bank teller is a service within the ordinary course of First Union's banking business.

First Union further asserts that Chin's evidence also establishes that Cardenas was acting exclusively for his own benefit and that of Lehman. Thus, First Union contends that Cardenas was acting outside the scope of his employment because he had an "external, independent, and personal motive" to perform the act.

There can be no doubt that Cardenas was not steadfast in the performance of his duties and obligations to his employer when he chose to participate in a criminal scheme to accept forged checks for deposit. Cardenas was acting out of self-interest in participating in Lehman's scheme, and his conduct was "outrageous and violative of his employer's rules." *Commercial Business Systems*, 249 Va. at 46, 453 S.E.2d at 266. Nonetheless, it is clear that in doing so he was performing a normal function of a bank teller in accepting checks for deposit.

In sum, \* \* \* Chin did not have the burden of presenting evidence that Cardenas' acts were within the scope of his employment. Rather, having established that the employment relationship existed, Chin was entitled to have the case go forward with the burden on First Union to prove that Cardenas acted *outside* the scope of his employment.

\* \* \*

## CONCLUSION

For these reasons, we hold that the trial court erred in sustaining First Union's motion to strike Chin's evidence and awarding summary judgment to First Union. Accordingly, we will reverse the judgment of the trial court and remand the case for further proceedings consistent with the views expressed in this opinion.

*Reversed and remanded.*

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Notes:

1. During the course of the ensuing forgery scheme conducted by Lehman and Cardenas, Chin moved its account to Citizen's Bank of Washington, D.C. Checks drawn on both accounts were deposited into Lehman's First Union account.

2. The total amount of the forged checks reflected here is taken from Chin's motion for judgment. Chin concedes in that pleading that this amount is subject to amendment because some of the

forged checks were apparently deposited in another bank.

3. First Union had been permitted to call its expert witness out of turn at the end of the first day of the trial, but had not formally begun presenting its case when it moved to strike Chin's evidence. Accordingly, we will not consider the evidence received from that witness in reviewing the trial court's ruling.

4. An alternate approach in such circumstances has been to assign liability to the employer not vicariously through respondeat superior, but directly through the torts of negligent hiring and negligent retention. *See, e.g., J. v. Victory Tabernacle Baptist Church*, 236 Va. 206, 208-09, 372 S.E.2d 391, 393 (1988)(confirming prior recognition of the tort of negligent hiring); *Philip Morris Inc. v. Emerson*, 235 Va. 380, 401, 368 S.E.2d 268, 279 (1988)(recognizing tort of negligent retention). Chin did not allege either of these torts in its motion for judgment. Chin did allege negligent failure to supervise as a theory of liability in its motion for judgment, but abandoned that claim at the outset of trial on remand. Accordingly, the viability of that claim is not before us in this appeal.

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