

Circuit Court for Prince George's County
Case No.: CAL13-27570

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 198

September Term, 2016

WATTS & SIMS, INC. D/B/A TRADE
WINDS NIGHT CLUB, et al.

v.

SAMANTHA JOHNSON, et al.

Meredith,
Reed,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed,

Filed: May 23, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Amelia Mercer, Appellee, filed a complaint against Watts & Sims, Inc. d/b/a Trade Winds Night Club (“Trade Winds”) and Prince George’s County, Maryland, (the “County”) alleging that she was battered by an unknown off-duty Prince George’s County police officer.¹ The incident occurred while the officer was working as outside security for Trade Winds. The Circuit Court for Prince George’s County granted a motion for judgment in favor of Appellee, finding that the officers at the scene were acting within the scope of their employment for the County at the time of the injury, and a jury awarded her \$69,903.05. The County filed this timely appeal and presents a single question for our review, which we rephrased for clarity:

I. Did the trial court err in granting a judgment against the County?

For the reasons that follow, we answer this question in the affirmative. Therefore, we reverse the judgment of the circuit court and remand to that court for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

On January 5, 2013, several off-duty police officers were working “secondary law enforcement employment” as outside security for Trade Winds nightclub.² As outside

¹ The caption in this case is misleading. The County is the Appellant, Amelia Mercer is the Appellee, and Trade Winds and Samantha Johnson are not parties to this appeal.

² Off-duty Prince George’s County police officers who were present and working as security in the club’s parking lot were Lieutenant Jeffery Mitchell, Corporal Kenneth Bragg, Corporal Mancini Gaskill, Officer Noel Harrison, Officer Stephen Jeffries, Officer Charles Stone, Officer Harold Hayes, Officer Timothy Woods and Officer Damond Davis. Officers employed by the Town of Seat Pleasant, Sergeant Pettiford and Officer Matthews, were also present and working as security.

security, the off-duty officers' duties included patrolling the parking lots, preventing loitering and drinking in public, preserving the peace, "prevent[ing] any type of violent acts," and controlling traffic to allow club patrons to leave the premises when the nightclub closed. The officers were compensated by Trade Winds for shifts they worked and for required court appearances due to arrests made at the club. Prince George's County did not compensate the officers for their off-duty employment. The off-duty officers were contacted about work availability by higher ranking off-duty officers also working secondary employment at Trade Winds, but ultimately Trade Winds determined the schedules. Furthermore, Trade Winds had the sole ability to hire and fire any off-duty officer working as security.

All of the officers present at Trade Winds were wearing either a blue Prince George's County uniform or a green Prince George's County SWAT team uniform. In fact, pursuant to Prince George's County Police Department policy, all officers working secondary employment are required to wear their complete police uniform. Their uniforms included a combination of badges, name tags, and patches identifying them as officers. Additionally, each off-duty officer was equipped with their County-issued equipment, including gun and ammunition, baton, handcuffs, and pepper spray. The officers testified that they also drove to Trade Winds in their marked police cruisers.³

³ Officer Matthews, Corporal Gaskill, Lt. Mitchell, Officer Woods, and Officer Hayes testified at trial.

For these officers, their employment with Trade Winds is considered secondary employment outside of their regular police duties. The officers testified that patrolling the parking lots surrounding Trade Winds was not part of their regular duties with the County. They also testified that police officers seeking to work secondary law enforcement employment must obtain authorization from the Prince George's County Police Department. However, work performance for secondary employment is not evaluated by the police department.

Appellee was a patron of Trade Winds on January 5, 2013. At approximately 2 a.m., her sister, Iesha Mercer, was escorted out of the club by the club's bouncers after being involved in an altercation. Once outside, off-duty Corporal Mancini Gaskill was tasked with escorting Iesha Mercer off of the property. When another woman exited the club, Iesha Mercer punched Gaskill, ran towards the woman and punched her several times. Appellee then yelled to her sister to stop fighting, waving her left arm in the air. At that time, one of the off-duty police officers grabbed Appellee's arm, twisted it behind her back and pushed her, causing her to fall to the ground. Appellee was not arrested and no police report was filed regarding the incident. She suffered a broken arm and injuries to her left shoulder, hand, and ankle.

Appellee filed a complaint against Trade Winds and the County on September 17, 2013, alleging battery, negligence, and a violation of her right to be free from excessive

force by police officers.⁴ The County then filed a cross-claim against Trade Winds for indemnification and contribution. Later, Appellee filed an amended complaint naming officers Timothy Woods and Harold Hayes as defendants. The circuit court granted Woods and Hayes' motion to strike the amended complaint on September 21, 2015.

Trial commenced on October 21, 2015. Following jury selection, the trial court entered default judgments against Trade Winds, which did not participate in the trial, on Appellee's negligence claim and the County's cross-claim. At the close of the County's case, Appellee moved for judgment, arguing that the off-duty officers were acting within the scope of their employment for the County when they encountered appellee at Trade Winds. Appellee argued that there was insufficient evidence for a reasonable jury to conclude otherwise. The court granted the motion, finding as a matter of law that the off-duty officers were acting as police officers. The court stated:

These are police officers who by virtue of their uniforms and their equipment and their presence there, their marked cruisers, are exercising the police powers personally to the authority given to them by Prince George's County and the State. So to me this is clearly policing, even though it's paid for by the private employer.

* * *

It's not just the uniform. The uniform is certainly a part of it, but, you know, those officers are out there in that parking lot exercising independent judgment, their training and experience. They both testified that they thought these young

⁴ The complaint also included an allegation that appellee's injuries were caused by the County and Seat Pleasant's pattern and practice of failing to adequately train and supervise their police officers in use of physical force and tolerating a pattern of misconduct. The parties agreed to dismiss this claim.

ladies were under the influence of alcohol. It is, I would say, about 62 percent to me policing and 38 percent private security force.

The County noted this timely appeal.

STANDARD OF REVIEW

Maryland Rule 2-519, which governs motions for judgment, provides that “[a] party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence.” Md. Rule 2-519. We review a trial court’s grant of a motion for judgment *de novo*, considering the evidence and reasonable inferences drawn from the evidence in the light most favorable to the non-moving party. *See Thomas v. Panco Mgmt. of Md., LLC*, 423 Md. 387, 393-94 (2011). Under the rule, when a party moves for judgment based upon legal insufficiency of the evidence, the trial judge must determine if there is “any evidence, no matter how slight, that is legally sufficient to generate a jury question,” and if there is, the motion must be denied and the case submitted to the jury. *Id.* at 394 (quoting *C & M Builders, LLC v. Strub*, 420 Md. 268, 290, 22 A.3d 867, 880 (2011)). It is only when the “facts and circumstances only permit one inference with regard to the issue presented” that the issue is one of law for the court. *Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 503, 16 A.3d 159, 163 (2011).

DISCUSSION

A. Parties’ Contentions

The County argues that granting Appellee’s motion for judgment was improper and the issue of scope of employment should have been submitted to a jury. Reminding us that

a worker “may simultaneously be the employee of two employers,” *Lovelace v. Anderson*, 366 Md. 690, 716 (2001), the County asserts that the off-duty officers were employees of both the County and Trade Winds on the evening of the incident. The County relies heavily on the Court of Appeals’ decision in *Lovelace* and argues that “more than sufficient evidence” was presented at trial to allow a reasonable jury to conclude that an employment relationship existed between Trade Winds and the off-duty officers. Further, the County argues that the default judgment entered against Trade Winds on Appellee’s negligence claim is also evidence that the officers were working within the scope of their employment with Trade Winds. The County requests that we reverse and remand back to the circuit court to determine whether an employment relationship existed between Trade Winds and the officers and, if so, whether the off-duty officers were acting in furtherance of that relationship when Appellee was injured.

Appellee argues that the question of scope of employment is a question of law for the court to decide because the facts are undisputed. Appellee focuses mainly on the officers’ uniforms and County-issued equipment and contends that there is “an abundance of evidence in this case” to support its argument that the off-duty officers were operating as police officers.

B. Analysis

Appellee frames the issue as whether an employment relationship existed between the off-duty officers and Trade Winds. However, that is not the issue here. In fact, when the subject of dual employment arose, the following ensued:

[APPELLEE’S COUNSEL]: So you’re finding that they were dually employed? Because there’s already been a default judgment entered against Watts & Sims, even though they’re not here - -

THE COURT: Right.

[APPELLEE’S COUNSEL]: They’ve already been found negligent - -

THE COURT: Right, right. Yeah, that’s going to be - -

[APPELLEE’S COUNSEL]: - - based on the actions of these -

THE COURT: The officers.

[APPELLEE’S COUNSEL]: - - officers.

THE COURT: Yeah. So they’re - - the officers are clearly agents of the club and so they’re - - the nightclub is going to be liable for whatever damages, for damages.

Instead, the question is whether there was sufficient evidence for a reasonable jury to find that the off-duty officers’ actions were within the scope of their employment with Trade Winds, rather than the County, on the night of Appellee’s injury. We hold that the issue should have gone to the jury because there was “evidence, no matter how slight, that is legally sufficient to generate a jury question.”

There are many considerations relevant in determining whether a particular action is within the scope of an employment relationship. “The general test set forth in numerous Maryland cases for determining if an employee’s tortious acts were within the scope of his employment is whether they were in furtherance of the employer’s business and were ‘authorized’ by the employer.” *Sawyer v. Humphries*, 322 Md. 247, 255, 587 A.2d 467 (1991). Other considerations include, whether the action was personal to the employee,

whether it occurred during the time the employee was on duty for the employer, and whether it related to the employee’s duties. *See Lovelace*, 366 Md. at 717.

In *Lovelace, supra*, the Court of Appeals held that the motion for summary judgment should have been denied because a genuine issue of material fact existed as to whether the off-duty officer was acting as private security and within the scope of that employment relationship when a gun battle occurred. *Id.* at 721. There, police officer Kenneth Anderson worked as a “plain clothes” security guard for a Days Inn in Baltimore County, during the hours that he was off-duty from the Baltimore City Police Department. *Id.* at 697. At that time, two armed robbers entered the hotel lobby and attempted to rob the hotel clerk at gunpoint, Anderson confronted the men and a gun battle ensued. *Id.* at 698-99. One of the robbers was killed, the other was injured, and an uninvolved hotel guest—Lovelace—was hit by a stray bullet. *Id.* Lovelace sued, among others, Anderson and the hotel. The trial court granted summary judgment in favor of the defendants, and the Court of Special Appeals affirmed. *Id.* at 709-10.

In affirming the judgment, the Court of Special Appeals reasoned that when the robbery began “Anderson reverted to his police officer status, that he was not the agent of [the hotel], and that he was acting exclusively within the scope of his employment as a law officer at the time of the shooting.” *Id.* at 710. The Court of Appeals reversed, noting that Anderson was “dually employed” by Baltimore City and Days Inn. The Court’s decision rested on the fact that

“[t]he evidence that was before the Circuit Court for purposes of ruling on the motions for summary judgment demonstrated

that, during the attempted robbery of the Days Inn, Anderson was employed by the hotel as a security guard and was acting within the scope of that employment. In preventing the completion of an armed robbery, Anderson was performing one of the specific duties for which he had been hired by the hotel management.”

Id. at 720-21.

The evidence presented at trial included that Anderson was hired by the hotel, paid by the hotel, and on duty as a hotel employee at the time of the incident. *Id.* at 719. Furthermore, the hotel had the authority to discharge Anderson, and providing security for the hotel and its guests was part of the hotel’s business. *Id.* The Court concluded that granting the motion for summary judgment was improper because the evidence before the court was “more than sufficient to show an employment relationship between Anderson and the hotel during the attempted robbery, and to show that Anderson was acting within the scope of that employment relationship, even assuming *arguendo* that he was also acting as a Baltimore City police officer.” *Id.* at 718-19.

Most recently, this Court came to a similar conclusion in *Prince George’s County v. Morales*, 230 Md. App. 699 (2016). There, while working as private security for a fraternity’s Halloween party, off-duty Prince George’s County officer Dominique Richardson was involved in an altercation with one of the partygoers, Steven Morales. *Id.* at 703-06. The altercation occurred after a large crowd had grown outside of the venue and resulted in Richardson punching Morales in the mouth and putting him in a chokehold. *Id.* During trial, the County moved for judgment arguing that there was insufficient evidence that Richardson was acting within the scope of his employment with the County. *Id.* at 710.

The trial court denied the motion and the issue was sent to the jury. *Id.* On appeal, the County argued that the issue should not have been sent to the jury “because the evidence conclusively established that Richardson was acting outside the scope of his employment” as an officer. *Id.* at 721. We affirmed the decision of the trial court, holding that there was sufficient evidence to generate a jury question as to whether Richardson took police action against Morales, and therefore was acting within the scope of his employment with the County. *Id.* at 727.

Significant to our holding, we noted that Richardson was adorned in his County-issued equipment and testified that he used his police training and authority during the altercation. *Id.* at 727-28. Additionally, Richardson filed a “use of force” police report after the incident and a jury could infer that he was providing law enforcement services for the County by controlling a seemingly aggressive individual in a public setting. *Id.* at 729. We concluded that this was sufficient evidence for “the jury to find by a preponderance of the evidence that, even if Richardson’s crowd control duties were within the scope of his employment by the fraternity, his actions during his altercation with Morales were within the scope of his [County] employment.” *Id.* at 730.

In the case at bar, the evidence shows that the off-duty police officers were hired by Trade Winds to provide outside security, were paid by Trade Winds, the incident involving Appellee occurred during the officers’ work hours with Trade Winds, and providing outside security for Trade Winds and its patrons was a duty for which they were hired by the club. Therefore, we hold that considering the evidence, and reasonable inferences

drawn from the evidence, in the light most favorable to the non-moving party, there is “evidence, no matter how slight, that is legally sufficient to generate a jury question.”

**JUDGMENT FOR THE CIRCUIT COURT
FOR PRINCE GEORGE’S COUNTY
REVERSED AND REMANDED FOR
PROCEEDINGS CONSISTENT WITH
THIS OPINION. COSTS TO BE PAID BY
APPELLEE.**